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IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 13,013

---

THE BALTIMORE AND OHIO RAILROAD COMPANY,
*Appellant,*

v.

DANIEL T. JACKSON, *Appellee*

---

Appeal from the United States District Court for the District of Columbia

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## JOINT APPENDIX

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I.

## PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

282 Filed June 16, 1955

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4108-52

DANIEL T. JACKSON, *Plaintiff*.

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Defendant*

**Amended Complaint Filed Pursuant to Pre-trial Order**

Plaintiff, for his complaint, alleges:

FIRST CAUSE OF ACTION

FIRST: Defendant is a railroad corporation organized and existing under and by virtue of the laws of the State of Maryland and is doing business within the jurisdiction of this Court as an interstate common carrier.

SECOND: Plaintiff is, and at the times hereinafter alleged was, a resident of the State of Maryland.

THIRD: This action arises under the Act of Congress of April 22, 1908, 35 Stat. 65, Chapter 149, with amendments thereto, commonly known as the Federal Employers' Liability Act (45 U.S.C.A. Sections 51-60) as hereinafter more fully appears.

FOURTH: On the dates, and at all times hereinafter mentioned, plaintiff and defendant were engaged in interstate commerce, within the purport of said Act.

FIFTH: On November 1, 1951, plaintiff was injured on defendant's tracks in the vicinity of Washington Grove Station, Maryland.

SIXTH: On said date, plaintiff, in the course of his duties as a section foreman, was required to operate a

motor car to which a truck was attached, and while so engaged was caused to sustain injury.

283 . SEVENTH: The injuries of the plaintiff were directly and proximately caused in whole or in part by the carelessness and negligence of the defendant, its servants and agents.

EIGHTH: Defendant was negligent because the motor car which plaintiff operated was required to pull a heavy load over wet and slippery rails when said truck was not equipped with any brakes or other means of stopping.

NINTH: Defendant was negligent because it had directed plaintiff to operate a car and truck without sufficient braking power.

TENTH: By reason of defendant's negligence thereof, plaintiff sustained a fracture of the third lumbar vertebral body, traumatic degeneration of the intervertebral disc between the third and fourth lumbar vertebrae and severe injuries to the head, neck, back, chest, arms and legs, and severe nervous shock, all of which has caused him great mental and physical pain and he will so suffer for the remainder of his life; that plaintiff was given hospital and medical care and treatment following the accident, and that he will require, receive and incur expenses for additional medical care and treatment in the future.

ELEVENTH: At the time of the aforesaid accident, plaintiff was earning and capable of earning substantial wages as a section foreman, but by reason of the occurrence hereinbefore set forth, he has lost wages and earnings which he otherwise would have acquired and has become totally incapacitated from resuming his former railroad occupation and from engaging in any other form of labor.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of $100,000.00 and costs on this Cause of Action.

## Second Cause of Action

Twelfth: Plaintiff incorporates by reference thereto all of the averments of paragraphs First to Sixth inclusive and Eighth to Eleventh inclusive of the First Cause of Action.

284 Thirteenth: The injuries of the plaintiff were directly and proximately caused in whole or in part by the defendant's violation of the Safety Appliance Act, 45 U.S.C. Sections 1, 8, 11 and 23 and I.C.C. Regulations 204 and 235 because the motor car was not equipped with sanding apparatus and other appurtenances set forth below.

Fourteenth: Defendant violated Sections 1, 8, 11 and 23 of the Safety Appliance Act because the motor car was not equipped with a power driving wheel brake.

Fifteenth: Defendant violated Sections 1, 8, 11 and 23 of the Safety Appliance Act because the truck was not equipped with any brakes.

Sixteenth: Defendant violated Sections 1, 8, 11 and 23 of the Safety Appliance Act and I.C.C. Regulations 204 and 235 in that it had directed plaintiff to operate a car and truck without sufficient braking power.

Wherefore, plaintiff prays judgment against the defendant in the sum of One Hundred Thousand Dollars and costs on this Cause of Action.

Harry P. Warner
Harry P. Warner,
916 Evans Building,
Washington, D. C.
*Attorney for plaintiff*

285 Filed Dec. 8, 1952

**Answer**

**First Defense**

The complaint fails to state a claim against defendant upon which relief can be granted.

**Second Defense**

The defendant answers the numbered paragraphs of the complaint as follows:

1. Defendant admits that it is a railroad corporation organized under the laws of the State of Maryland and doing business within the District of Columbia as an interstate common carrier.

2. Defendant admits that plaintiff is, and at the times alleged in the complaint was, a resident of the State of Maryland.

3. The defendant admits that this action is brought under the Federal Employers' Liability Act.

4. Defendant admits that at the time the accident complained of took place, plaintiff and defendant was engaged in interstate commerce within the purport of the Federal Employers' Liability Act.

286 5. Defendant admits that the accident complained of took place November 1, 1951 on defendant's tracks in the vicinity of Washington Grove Station, Maryland.

6. Defendant admits that on November 1, 1951 plaintiff, in the course of his duties as a section foreman, operated a motor car and the accident complained of took place while plaintiff was so engaged.

7. Defendant denies that the injuries alleged by plaintiff were caused by the carelessness and negligence of the defendant, its servants or agents. Defendant denies that

it violated the Safety Appliance Act, or that the alleged injuries to the plaintiff were caused by any violations by defendant of the Safety Appliance Act.

8. Defendant denies that plaintiff was seriously or permanently injured as a result of the aforesaid accident. The defendant denies each and every allegation contained in Paragraph 8 of the complaint.

9. Defendant denies that plaintiff became totally incapacitated from resuming his occupation or from engaging in any other form of labor. Defendant denies each and every allegation contained in Paragraph 9 of the complaint.

10. Defendant denies each and every allegation of the complaint not specifically admitted herein.

THIRD DEFENSE

Any injuries sustained by plaintiff as set forth in the complaint were caused by an unavoidable accident
287 or were caused in whole or in part or were contributed to by plaintiff's negligence.

STEPTOE & JOHNSON

* * * * * * * * * *

296 24 Cong. Rec. 1477

The four-wheel exemption was offered as an amendment to H.R. 9350 on February 11, 1893 by Senator Blodgett:

Mr. Blodgett: I desire to offer an amendment. At the end of Sec. 6 of the bill as reprinted. I move to add the following proviso: Provided, that nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains . . . Mr. President, I presume most Senators understand that coal from the mines is transported to the seaboard in four-wheel cars. The custom is to run such cars to the junction points of lateral roads and from those junction points to the mines where they are loaded. The four-wheel cars are used,

because it would be practically impossible to run an eight-wheel car to the mines over the sharp grades and around the sharp curves necessary in reaching the mines. The coupling construction is a peculiar one, and is adapted to that particular work. A hook arrangement and link are used with considerable lost motion between the cars.

It is necessary to use that appliance, as I said, in order to go around the sharp curves. I believe it would be practically impossible to place the train brake and automatic coupler upon cars such as are used in that traffic,
297 and if the bill is not amended as I propose, it will compel a reshipment of coal at all the junction points on the lateral roads to the main stem. I do not know that the cars containing but four wheels are used in any other service in the country except the coal service. Hence, I think the amendment is a very proper one.

Mr. Cullom: I have had some conversation with the Senator from New Jersey in reference to his amendment, and he being much more familiar with the general subject of running the four-wheel cars than I, I am inclined to think perhaps his amendment is correct. I shall make no opposition to it myself. I have no objection to its adoption.

Mr. Stockbridge: Let the amendment be read. (The Secretary read Mr. Blodgett's amendment to the amendment of the Committee.)

Mr. Stockbridge: That is all right.

(The amendment to the amendment was agreed to)

. . . . . .

298 DISTRICT COURT OF THE UNITED STATES

in and for the

EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

---

No. 5522.

UNITED STATES OF AMERICA, *Plaintiff*

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *Defendant.*

FARIS, J.

---

At a session of Court held in St. Louis, Missouri, on May 11, 1922, the Court orally announced the following opinion:

This is a case in which a jury was waived, and which was submitted to the Court a few days ago on an agreed statement of facts. I have now reached a conclusion.

I regard is as unnecessary to detail the facts which are stipulated, because in so far as those facts are pertinent in connection with the law I shall state them in what I have to say about the case.

The case turns practically upon a question of
299 law and upon what was in the mind of Congress when it amended a certain statute. Suffice it to say, that the facts agreed upon between the United States District Attorney, representing the plaintiff, and counsel for defendant, clearly suffice to render the defendant guilty of violating Section 6 of the Act of March 2, 1893 (27 Stats., 531) as amended by The Act of April 1, 1896 (29 Stats., 85), provided, of course, as I said in the beginning, the Court shall find as a matter of law that the facts bring the defendant within the purview of the statute as it stood when the acts complained of were committed.

It clearly appears from the agreed statement of facts, that some two miles or more (it does not make any particular difference about the number of miles) of the main line interstate track of defendant are used daily, or almost daily, by the Cape Girardeau Portland Cement Company on which to operate small four-wheel cars used in hauling clay to the Cement Company's factory from the mine whereat that clay is mined. These cars, as well as the locomotive which hauls them, as also the employees, including the engineer in charge of this train, are employees of the Cement Company and not of the defendant in the case. That, of course, is said merely casually, because it does not make any difference in the case.

The statute forbids the use of cars that have certain defects, which these cars have, upon an interstate railroad track, and makes the railroad company liable. If the railroad company permits somebody else to use these interstate tracks in derogation of the law the railroad company, of course, and not the person or company which so uses
300 them, is liable. So, if the law now in force applies to four-wheel cars used in hauling clay, defendant is clearly liable and judgment ought to be rendered against it for the penalty fixed by statute. It is clear that there is nothing involved in the case, as I stated before, except an investigation of the facts under the Act as first passed, that is, when passed in 1893. There was then a proviso which exempted defendant from penalties for defects occurring in the operation of trains composed of four-wheel cars. This proviso read thus:

"Provided, that nothing in this Act contained shall apply to trains composed of four-wheel cars, or to locomotives used in hauling such trains."

As originally passed that is what the proviso contained, and that is all that it contained. It is clear, then, that before the Act of 1893 was amended, defendant would not have been liable here, and judgment out of hand must have been for defendant, but by the Act of April 1, 1896, the

prior law was amended so that the proviso contained in the original Act of March 2, 1893, read, at the time the acts complained of in this case were committed, as follows:

"Provided, that nothing in this Act contained shall apply to trains composed of four-wheel cars, or to trains composed of eight-wheel standard logging cars, when the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."

It is contended by the Government, therefore, that the character of the freight hauled now is determinative of the question, that is, that a four-wheel car may be used, or a standard eight-wheel logging car may be used in hauling logs, even though the equipment may violate the law otherwise, but that if a four-wheel car be used for
301 any other purpose than a logging car the Act is violated.

In order to lend color to this view the attention of the Court has been called to the report of a Committee of Congress (I do not know to what branch of Congress that Committee belonged, and it does not make any difference), which Committee had in hand the matter of reporting upon the amendment proposed, and finally passed in 1896, as throwing some light upon what was in the congressional mind when the amendment was added.

This report indicates that the Committee had the notion that the original proviso exempting all four-wheel cars was put in for the sole purpose of relieving logging cars from the burden of the Act. It is urged that the Committee had only then just discovered that eight-wheel standard flat cars are used for hauling logs, and not four-wheel cars at all; so, that the original Act interfered with logging operations. The Committee assumed, incorrectly, it is apparent, that the original proviso was enacted for the sole behoof and benefit of those engaged in logging. If this be

a fact the proviso itself, as originally enacted fails to disclose it, for this proviso exempted all trains composed of four-wheel cars and the locomotives hauling them, regardless of whether such cars haul clay, brick, rock or logs, or any other commodity for which four-wheeled cars may be used.

It seems to be obvious that Congress believed it had happily provided for the exemption of logging cars, when it exempted all four-wheel cars by the original Act of 1893. Later it became advised that it had erred as to a matter of fact, not of law, in that eight-wheel standard flat cars were found to be used in the logging business,
302 and not four-wheel flat cars at all, or at least but rarely. Hence, the amendment which caused this action.

It is wholly obvious to me, that neither what the Congress enacted in and by the amendment of April 1, 1896, nor what the Committee said about its intention in its report, is inconsistent with the view that Congress by this amendment intended to add to the exemptions, rather than to restrict or narrow them further. In the original amendment four-wheel cars were all exempt, I repeat, from the provisions of the Act, but no eight-wheel standard flat cars were exempt. It would have been very easy, I think, if Congress had intended, therefore, to narrow and restrict, rather than to broaden this proviso, for it to have said so, when you consider the fact that originally all four-wheel cars were exempt, that is, all trains on which four-wheel cars only were used were exempt, and when you consider that Congress deemed it had fully covered the situation then, but finding that it had been guilty of an error of fact, deemed it necessary to amend by specifically allowing eight-wheel standard flat cars to be used; that it intended not to forbid the use of four-wheel cars by that amendment, and that it did not intend to exempt four-wheel flat cars only when those were used for logging purposes, because the fact appears that Congress finally discovered that no

such cars were used. Then if it had only in mind the idea of exempting logging operations, and none other, from the operations and provisions of this Act it would have been easy to have said so. Of course, the Court is not permitted to construe this Act on the theory of what is best. I can only construe it from the rule as it appears in the Act itself. If I were permitted to go into the realm of
303 hypothesis and guess about it I should conclude, naturally, that a four-wheel car loaded with logs would be a greater menace to interstate traffic, both freight and passenger traffic, and to the employees engaged therein, than would the same sort of car loaded with material like clay. The logs themselves upon it would be a menace, in addition to the car which hauls those logs.

I also might consider (if I were to go into the realm of fact, and were allowed to consider the facts, or to consider the hurt and harmfulness of the thing done, rather than the terms of the statute itself), that an eight-wheel standard flat car loaded with logs was about five times as menacing to interstate traffic, to the employees, to the passengers and to the freight carried therein, as is a four-wheel car loaded with clay. I think it is clear, when you interpret what Congress actually did, in the light of the situation existing before it did it, and after it did it, that it could not have intended to eliminate from the exemptions four-wheel cars, or to require those four-wheel cars to be used for logging purposes, because it is conceded by the Government here that a four-wheel car used for logging purposes is exempt from the provisions of the Act, but that a four-wheel car used for hauling clay is not exempt by the provisions of the Act. I repeat, that in the light of the fact that Congress discovered for the first time in 1896, that four-wheel cars were not used for logging purposes, but that eight-wheel standard flat cars were used for logging purposes, that that fact alone clears up the situation entirely and makes it incumbent upon the Court to find for the defendant in this case, which the Court accordingly does.

304 If you want me now, in addition to these remarks, Mr. Carroll, to pass on any declarations of law in order that you might test the accuracy of the Court's views, I shall be glad to do so.

Mr. Carroll: I would like to have that permission.

The Court: Very well.

---

305 Filed Mar. 10, 1955

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4108-52

DANIEL T. JACKSON, *Plaintiff*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, *Defendant*

**Order**

Upon consideration of defendant's motion to strike so much of plaintiff's complaint which alleges violations of the Safety Appliance Act, 27 STAT. 531 (1893) as amended, and upon consideration of briefs and memoranda of law submitted by plaintiff and defendant, it is hereby

ORDERED, ADJUDGED AND DECREED this 10th day of March, 1955, that defendant's Motion to Strike is hereby denied.

MATTHEW F. McGUIRE
*Judge*

306 Filed May 10, 1955

**Memorandum to the Clerk**

The Court adheres to its original position. It is not at all insensible to the practical argument advanced for the

non-inclusion of the type of vehicle involved here under the Safety Appliance Act.[1]

The fact is, however, that there is authority of respectable character which supports the position already taken.[2] The Court in the Hoffman case took the view that the statute was unambiguous. This is sound and accordingly resort cannot be had to extrinsic aids to construction. Nor does the fact, if it is a fact and it appears to be such, that the Interstate Commerce Commission has never since the passage of this statute some sixty years ago taken any steps to regulate vehicles of the character here involved inhibit this view, because the rule is that where there is no ambiguity, executive construction cannot change the plain language of a statute. (District of Columbia v. Pearson, (1921), 50 App. D.C. 303, 271 Fed. 377; Kansas City Southern R. Co. v. U.S. (1919), 252 U.S. 147. Federal Trade Comm. v. Bunte Bros., Inc., 312 U.S. 349, 352 is dictum and not helpful.)

MATTHEW F. McGUIRE
Matthew F. McGuire
*United States District Judge*

5/10/55

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[1] 27 Stat. 531-2 (1892) as amended, 29 Stat. 85 (1896).

[2] Hoffman v. New York, N.H. & H.R. Co. 74 F. 2d 227, 232 (2d Cir. 1934); Spokane & Inland Empire Railroad Company v. United States, 241 U.S. 344, 350.

307 Filed June 23, 1955

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 4108-52

DANIEL T. JACKSON, *Plaintiff*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Defendant.*

**Verdict and Judgment**

This cause having come on for hearing on the 16th day of June, 1955, before the Court and a jury of good and lawful persons of this district, to wit:

| | |
|---|---|
| Clayton P. Balzer | William C. Smith |
| Milton Goldstein | Mrs. Emma H. Taylor |
| Clifford M. Hedrick | Hermon Polivoda |
| Roderick T. Bell | John A. Baronowski |
| Jesse L. Huestis | John A. Dunkel |
| John M. Kamrad | Mrs. San Juan W. Barnes |

who, after having been duly sworn to well and truly try the issues between Daniel T. Jackson, plaintiff and The Baltimore and Ohio Railroad Company, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 23rd day of June, 1955, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendant by reason of the premises is the sum of fifteen thousand dollars ($15,000.00)

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant the sum of fifteen thousand dollars ($15,000.00) together with costs.

HARRY M. HULL, *Clerk,*
By ANNE W. LYDDANE
*Deputy Clerk.*

By direction of
Judge JENNINGS BAILEY

(n)

308 Filed Oct. 6, 1955

The crux of this case is whether the Safety Appliance Act applies to the vehicle which the plaintiff was operating when injured. This vehicle was used in towing a truck and to that extent it was acting as a locomotive and was not used exclusively for the transportation of logs. Judge McGuire, in a memorandum opinion, overruled a motion to strike so much of the complaint as alleges a violation of the Safety Appliance Act. Apart from any question of being bound by that ruling I agree with it.

As in my opinion also the Act applies and as I find no merit in the other grounds set out in the defendant's motion, its motion for judgment non obstante veredicto or in the alternative for a new trial will be overruled.

JENNINGS BAILEY
*Judge*

---

309 Filed Oct. 6, 1955

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 4108-52

DANIEL T. JACKSON, *Plaintiff*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Defendant.*

**Order Overruling Motion for New Trial**

Upon the coming on for hearing of the motion filed herein by defendant for judgment N.O.V. or in alternative, for a new trial, it is this 6th day of October, 1955, ordered that said motion be, and the same is hereby overruled.

HARRY M. HULL, *Clerk,*

By ANNE W. LYDDANE
*Deputy Clerk.*

By direction of
Judge JENNINGS BAILEY

310 Filed Nov. 2, 1955

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 4108-52

DANIEL T. JACKSON, *Plaintiff*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, *Defendant.*

**Notice of Appeal**

Notice is hereby given this 2nd day of November, 1955, that defendant Baltimore and Ohio Railroad Company hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23d day of June, 1955 in favor of plaintiff Daniel T. Jackson against said defendant Baltimore and Ohio Railroad Company.

STEPTOE & JOHNSON

By LAIDLER B. MACKALL

*Attorneys for Defendant Baltimore and Ohio Railroad Company*

311 Filed Nov. 12, 1955

**Designation of Record**

The Clerk of the United States District Court for the District of Columbia will please prepare a record on appeal for the United States Court of Appeals for the District of Columbia Circuit in the above entitled cause, and the following papers and proceedings are hereby indicated for inclusion in said record on appeal:

1. Amended complaint filed pursuant to pre-trial order.

2. Answer.

3. 24 Congressional Record 1477, quoted in Appendix A to defendant's reply memorandum in support of defendant's motion to strike.

4. Text of unreported decision in United States v. St. Louis-San Francisco R. Co., D.C., E.D. Mo. 1922, quoted in Appendix B to defendant's reply memorandum in support of defendant's motion to strike.

5. Order entering judgment for plaintiff in the amount of $15,000.00, entered June 23, 1955.

312 6. Opinion of Court and Order overruling motion of defendant for judgment n.o.v. or in the alternative, for a new trial, entered October 6, 1955.

7. (a) Partial transcript of testimony of June 15, 1955;

(b) Transcript of testimony of June 20, 1955, Volume I;

(c) Transcript of testimony of June 21, 1955, Volume II;

(d) Transcript of Court's charge to jury.

8. Defendant's exhibits:

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20.

9. Notice of appeal, filed November 2, 1955.

10. This designation.

* * * * * * * * * * *

314 Filed Nov. 15, 1955

**Appellant's Statement of Points**

The points upon which appellant intends to rely on this appeal are as follows:

1. The Court erred in holding that the Safety Appliance Act applied to the motor track car and push truck involved in this case.

2. The Court erred in submitting to the jury the question whether the absence of the equipment allegedly required by the Safety Appliance Act was a proximate cause of the accident in which plaintiff was injured.

3. The Court erred in submitting to the jury the question whether defendant's alleged negligence in furnishing the equipment plaintiff was using at the time of the accident was a proximate cause of the accident in which plaintiff was injured.

4. The Court erred in denying defendant's requested instructions numbers 1, 2, 3, 4, 5, 6 and 7.

STEPTOE & JOHNSON

* * * * * * * * * * *

316 Filed Nov. 15, 1955

**Amendment to Appellant's Designation of Record**

In addition to the papers and proceedings indicated for inclusion in the record on appeal heretofore requested in plaintiff-appellant's designation of record filed herein on November 12, 1955, the following additional papers are hereby indicated for inclusion in said record on appeal:

11. Statement of Points on Which Appellant Intends to Rely.

12. Stipulation entered into by the parties to this action through their respective counsel of record concerning the testimony of Leo Meltzer, United States Department of Justice.

13. This amendment to designation of record.

STEPTOE & JOHNSON

• • • • • • • • • • •

317 Filed Nov. 17, 1955

**Plaintiff-Appellee's Designation of Additional Portion of the Records to be Included**

The Clerk of the United States District Court, for the District of Columbia, will please include ~~in the~~ record on appeal in this matter in addition to those designated by the defendant-appellant:

1) Opinion and Order of Honorable Matthew F. McGuire sur. defendant's motion to strike.

2) Memorandum to the Clerk by Honorable Matthew F. McGuire sur. defendant's re-argument of defendant's Motion to Strike.

3) This Designation.

The Clerk will further note the objection of the plaintiff-appellee to the inclusion in the record of testimony relating to the injuries suffered in this case by reason of the fact that no issue upon which such testimony is relevant is raised by defendant's Statement of Points.

MILFORD J. MEYER

• • • • • • • • • • •

**EXCERPTS FROM TESTIMONY AND PROCEEDINGS**

217 **Daniel T. Jackson**

was called as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Meyer:

Q. What is your full name, Mr. Jackson?

. . . . . .

A. Daniel Thomas Jackson.

Q. Where do you live? A. Boyd, B-o-y-d.

Q. Boyd. And in what county is that?

. . . . . .

A. Oh, Montgomery County.

. . . . . .

218 Q. How old are you? A. I was 69 last birthday.

Q. Back in November of '51, on November 1, specifically, how old were you? A. Sixty-six.

Q. Mr. Jackson, when did you go to work for the Baltimore and Ohio Railroad Company? A. On the 12th day of April, 1905.

Q. 1905? A. Yes, sir.

Q. So that you were working with them for some forty-six and a half years before this accident happened? A. Yes, sir.

Q. What sort of work did you do during all those years? A. Well, I worked pretty—track work; I worked as a trackhand for the first seven years. I was promoted to foreman in 1912, August 1, 1912.

Q. And you were a foreman from 1912 until 1951? A. Yes, sir; I was until I was retired.

Q. You were still doing work as a track foreman? A. That is right.

. . . . . .

219 Q. Now, on November 1, 1951, what work were you assigned to do? A. I was assigned to take a truck-
220 load of coal down to the agent at Washington Grove.

Q. To the agent at Washington Grove Station is that? A. Washington Grove Station.

Q. Where was your base? Where did you start from? A. Gaithersburg.

Q. How far is that from Washington Grove Station? A. About a mile.

Q. What equipment did the Railroad supply you with for the purpose of doing your work? A. A motor car and a truck.

Q. Did the truck have any power of its own? A. No, sir.

Q. How was the truck propelled? How did it move along the rails? A. Pull it with the motor car.

. . . . . .

Q. Suppose you describe the motor car? A. Well,
221 it was a four-wheeled car that run on the track, with a clutch; two levers up there; one brake; pull one back for the clutch; with kind of a sliding motor in it. Motor—crank it from the center; brought back towards the hind end; hind end was the light end of it. Pulled this lever back; had a belt pull it. Pull the lever back; that tightens the belt and pull it.

Q. How would the belt operate on the brakes? A. The belt on the brakes? They didn't have anything to do with that.

Q. Well, how would the brakes operate? A. Well, by this here—you had a lever sitting right up on top of the motor car; grab that and pull it back. Had brakeshoe, one fit against each wheel; kind of gap like that (indicating); push it against the wheel that way.

Q. What sort of wheels were there? A. Iron wheels.

Q. Were they flanged to run on railroad tracks? A. Had flange on them to hold them on the track, yes, sir.

Q. What sort of brakeshoes were they? A. Steel.

Q. Did they move directly against the steel wheel? A. Yes, sir.

222 Q. Was there any brake lining of any sort? A. No, sir.

Q. Now, how about the truck that you were assigned? Did that have any brakes at all? A. No, sir.

Q. What sort of a truck was that? A. We call them push trucks. Don't have any motor car to them; push them by hand.

Q. How many wheels did that have? A. Four.

Q. What sort of wheels? A. Steel wheels or iron.

Q. With flanges? A. Flanges, yes, sir.

Q. Now, could either the truck or the motor car be operated anywhere except on the rails of the railroad? A. No way you could use them no place only on the rails. You could push them on the ground for a short distance. Sometimes unload them, had to pull them off; pull them beside the track. You could push them on the ground, but had no power to pull it.

Q. Now, did the motor car have on it any brakes or braking apparatus that could brake the wheels of the truck behind it? A. No, sir.

223 Q. Did the motor car have on it any sanding apparatus that could be poured on the rails to help stop? A. No, sir.

Q. Did the motor car have any air brakes at all? A. No, sir.

Q. Did the truck have any hand brakes? A. No, sir.

Q. Now you said that you went down to Washington Grove Station with a load of coal. A. Yes, sir.

Q. And where was the coal carried? A. Put it in the railroad room up at the Station.

Q. How did you get it down there, on the car or on the truck? A. We put the coal on the truck and pulled it down with the motor car.

Q. That is on the rails of the railroad? A. Yes, sir.

Q. Then what did you do after that, during that day? A. Well, I went on down road crossing at Washington Grove and pulled the motor car and the truck off. Washington Grove road crossing—I went there to work between Washington Grove and the road crossing the balance of the day on the track.

* * * * * * * * * * *

225 Q. How long is each length of rail? A. Thirty-nine feet.

Q. That will give us a good idea. That had to be lifted with jacks in order to fix it; is that right? A. That is right.

Q. Now, did you, as a track foreman, do any of the heavy work yourself? A. Well, lots of times when the gang was light, wouldn't have men enough; sure, I had to get in there and help to lift those rails. Sometimes they have a broken rail to change, ties to put in, switch ties, cross ties. Switch ties run from 9 feet long to 22 feet. They are 7x9 inches thick; nine-inch face; 7 inches thick. Some weight there.

Q. And you had to do that work yourself when you had a light gang? A. I had to help, sure.

Q. How many men did you have in your gang
226 this day? A. Two.

* * * * * * * * * *

Q. How long did you stay at the place where you were working that day? A. How long did we stay there?

Q. Yes. A. Well, until we got the coal on—we stayed there the balance of the day after unload the coal, until about four o'clock, I got them lined up to go in.

Q. What does that mean? A. Well, you have a motor car form to fill up. You have to take it up to the train dispatcher; fill out a form just the same as run the train. Operator gives you the dope; you write down on that form what he tells you. You ask for so many minutes of track. He gives you that many minutes.

Q. In other words, you have to get permission to
227 use the tracks, so you don't interfere with the movement of trains? A. That is right. You give him whatever points you want between Washington Grove and Gaithersburg. He gives you that track for that many minutes.

Q. You got a clearance for your track. Then what did you do? A. We loaded up and started for Gaithersburg.

Q. What did you load up with? A. With tools, track

tools, crowbars, line bars, jacks, rammers, hammers, track dredges, flanging equipment; always carry that with you at all times.

Q. Where did you put all that equipment? A. Some of it on the truck; some of it on the motor car.

Q. And after you moved your motor car and your truck back onto the westbound rails, were they coupled together so that the motor car could pull the truck? A. Yes, sir.

Q. Now, at that time, Mr. Jackson, how much would you say that the truck, as it was loaded then, weighed?

Mr. Mackall: Your Honor, I object. I thinl he ought to specify what tools he had, rather than just—

The Court: I think he can do both. Proceed, Mr. Meyer.

Mr. Meyer: I think he has given practically everything.

228 By Mr. Meyer:

Q. You didn't mention one thing. Did you have a wheelbarrow on there, too? A. Yes, sir.

. . . . . .

Q. About what would you estimate was the weight of that truck as it was equipped then when you started back? A. With the tools and the truck?

Q. Tools and the truck. A. I estimate about 1200 pounds.

Q. Were there any men on the car? A. On the truck or the motor car?

Q. On the motor car. A. I had two men and myself.

Q. Were there any men on the truck? A. No, sir.

Q. Now, what was the first thing that you had to do in order to start back to Gaithersburg? A. Well, we put the motor car and the truck on the Washington Grove road crossing, pushed it on down to where the tools was,

229 working there, about half the distance between Washington Grove Station and road crossing, and loaded up the tools. This here motor car, you had to crank it from the center; you had to take a stripping to crank it; crank handle went in the side of it. Never used to crank it because it kicked back. Pushed it off so it was in gear;

stop the car and let the men get on and be seated, and proceed on.

Q. Did you do that that day, push the car until it started? A. Yes, sir.

Q. And then you stopped it for the men to get on? A. That is right.

Q. Now, at that time, was the motor car and the truck —were they both on the westbound rails of the railroad? A. Yes, sir.

Q. And just about where were they with reference to Washington Grove Station at that time? A. Well, I was just a few rails there east of the platform, east of Washington Grove.

Q. When you say a few rails east, are you still referring to the 39-foot rails that you mentioned before? A. Yes, sir.

Q. Now, what sort of an afternoon was that, Mr.
230 Jackson? A. Well, it was one of these kind of a heavy mist, practically all day. Wasn't raining hard enough to make you go in out of it, but just nasty day.

Q. Was it enough to moisten or wet the rails of the railroad? A. Yes, sir, the rails was wet.

Q. Now, after you made your stop, did the two men get on the motor car with you? A. Yes, sir.

Q. Then what did you do? A. Proceeded on, started for Gaithersburg.

Q. How far did your motor car move from the time you started then until something happened? A. About 195 feet.

Q. 195 feet? A. Yes, sir.

Q. All right. Now, as you started from this position where the men got on, what did you notice, if anything, around the Washington Grove Station? A. Well, I noticed a good-sized dog standing right along Washington Grove office window.

Q. Do you remember what kind of a dog it was? A. Well, I am not very familiar with dogs. It was a big long-haired dog. I would say—they both look very
231 much alike to me—collie or shepherd, one or the other, looked something like to me.

Q. Had you seen that dog around the Washington Grove Station at any time before this day? A. The first time I ever seen the dog around the Station. There used to be a school bus come out there in front of the station across the street; used to see him down there with the children. First time I ever seen the dog on that side of the railroad.

Q. On which side of you was the station, to your left or to your right? A. The station was to my left, on the left side.

Q. Between where you were on the westbound rails and the station, were there any other rails? A. On the eastbound side.

Q. Just the two rails of the eastbound track? A. That is right.

Q. All right. Now, as you started, you say you saw this dog standing at the station? A. Yes, sir.

Q. Then what happened? A. Well, just as I—the motor car was about to pass the dog, I had taken my eyes off the dog to look in the direction I was going, the fellow, Dorsey, on there with me, sitting on the same side
232 I was, I heard him holler, "Go back, go back." As I looked around, the dog was coming across the eastbound track; I reached, grabbed the brake back with everything I had. The dog jumped in the westbound track in front of the motor car and when the dog jumped in the westbound track in front of the motor car, there she went, derailed.

Q. Where were you sitting on the motor car and operating it? A. Next to the hind end, on the left side of the motor car.

Q. Left side of the motor near the hind end? A. Yes, sir.

Q. Was the brake right there with you, the hand brake, that it had? A. Yes, sir.

Q. Now you said that this fellow, Dausey—was his name? A. Dorsey.

Q. —who was on the car with you? A. Yes, sir.

Q. You heard him yell, "Go back"? A. That is right.

Q. You looked around and you saw the dog on the
233 eastbound track? A. That is right.

Q. And the dog ran across over to the westbound track? A. That is right.

Q. When was it that you pulled on the handbrake on the motor car? A. Well, as soon as I saw the dog coming across, that is when I pulled on the brake lever.

Q. How far did the motor car and the truck go from the time that you pulled on the handbrake until you struck the dog and derailed? A. Well, I figured it about a rail length.

Q. And that is as you have indicated?

The Court: I didn't understand you.

The Witness: About a rail length. One rail length.

By Mr. Meyer:

Q. You have indicated that is 39-feet; is that right? A. Yes, sir.

Q. Now, suppose you tell us how far it is from one rail to the other on the opposite track? How far are the rails apart? A. Well, at that point there, most of them, they got 14-foot track center. Fourteen feet from center of one track to the center of the next. That makes your
234 center ditch there something like that (indicating).

Q. I wasn't talking about the center ditch between the two sets of rails. How far are the rails apart? Take the eastbound track, how far— A. Gauge apart from one rail to the other? Four-foot eight and a half inches.

Q. Exactly? A. That is the gauge, yes, sir; that is standard.

Q. Now, at that point we are talking about, at Washington Grove Station, approximately how far was it from the inside rail of the eastbound track to the inside rail of the westbound track? A. Well, I couldn't tell you exactly on that, sir, just how far that was.

Mr. Meyer: Do you have that exact dimension on your plan?

Mr. Mackall: Yes.

Mr. Meyer: Mr. Mackall has the exact dimension.

By Mr. Meyer:

Q. Now, how far across did the dog get before the motor car struck it and derailed? A. The dog got right in between the two rails of the westbound track. Now, I didn't feel the car bump up on the dog. From what I could see—

I was in the ditch; couldn't get up, my back—was
235 no part of the dog on top of the rail. The dog was laying between the two rails on the westbound track.

Q. For how long, Mr. Jackson, before the date of this accident, had you been operating these motor cars for the Baltimore and Ohio Railroad? A. Well, about thirty-four years. I stafted to operating motor cars in 1917.

Q. Had you had occasion to apply the brakes on motor cars of this type and this particular motor car on occasions before this accident? A. I never had no occasion to make a quick stop like that with a truck.

Q. Not with a truck. A. No, sir.

Q. Had you had occasions to apply the brakes on the motor car without the truck? A. Yes, sir, I have.

The Court: You mean a quick stop?

By Mr. Meyer:

Q. A quick stop? A. Quick stop.

Q. There is one more condition that you haven't testified about yet. At the point of the Washington Grove
236 Station where this accident happened, that you have just described, is the westbound track straight? A. No, sir, it is curved.

Q. Curved. Which way does it curve? A. Well, if you are going west, it curves to your left.

Q. And in the lefthand curve is there any banking of the track? A. Well, at the point of the accident, it is on a stilt.

Q. What does that mean? A. Well, what they call a pile sitting on top, slopes down like that; run into a cut where you have a bank on each side of it.

Q. Is there any difference between the level of the right-hand rail and the lefthand rail on the westbound track at the station there where the accident happened? A. Yes, sir.

Q. What is the difference? A. There is a compound curve there. Part of it carries around 4½ inches, 5 at that point. I am not sure, it was either 4½ or 5 inches.

Q. Does that mean that the righthand rail would be higher than the lefthand rail? A. Yes, sir.

237 Q. So that the inside of the curve would be on the low side? A. That is right.

Q. And which way did your car go off the track? A. It went off to the left on the low side.

Q. On the low side? A. On the low side of the curve.

Q. And then you landed between the two sets of track? A. That is right. At that point, the center ditch was empty with ballast, below the ties. Hopped over like that (indicating) when I went off.

Q. Under the conditions that existed at that time and place, Mr. Jackson,—

Mr. Mackall: I object. Let us specify those conditions.

Mr. Meyer: I am going to if you give me a moment.

Mr. Mackall: Excuse me.

By Mr. Meyer:

Q. —traveling at the speed that you were going, with the rails moist or wet, as you have indicated, at the point where the accident happened on the lefthand curve, with the left rail being lower than the right, as it was, within what distance could you have stopped the motor car alone, if it didn't have any truck, if you applied the emergency brake or the handbrake, the only brake it had, in the man-

238 ner that you have just described you applied it on this occasion?

Mr. Mackall: Just a minute. I object to that question. He hasn't testified how fast he was going; and the question leaves out of consideration the fact that he skidded the wheels at the time he applied the brakes. I think those should be in.

Mr. Meyer: First of all, he couldn't expect the wheels to do anything but skid when the brakes were fully applied.

The Court. Speed.

Mr. Meyer: Speed, I think, is a proper objection. I will ask Mr. Jackson about that.

Mr. Mackall: You are assuming the wheels did skid?

Mr. Meyer: I am assuming they would skid when the brakes were fully applied and ran 39 feet.

Mr. Mackall: By skidding, I mean locked, slid along the rail.

Mr. Meyer: If the brakes operated, I guess they locked. Let's ask the witness.

By Mr. Meyer:

Q. Mr. Jackson, when you put the brake on full, as you described, did the brakes grab hold and lock? A. Yes, sir.

Q. All right, now answering Mr. Mackall's question out of order here, from there on, during the 39 feet that
239 it went after you applied your brakes, were the brakes locked? A. Yes, sir.

Q. I assume, then, that the car skidded, as he puts it, went along the rails without turning, if that is skidding? A. Yes, sir.

Q. All right. Now, you said you started from a stop a few rails east of the point where you applied the brakes; is that right? A. How is that?

Q. You started from a stop when you started the motor car and the truck, that that was a few rails east of the point where you finally applied the brakes; is that right? A. Yes, sir, that is right.

Q. Can you give us an estimate of how far it was in feet from the point where you started the car to the point where you applied the brakes? A. It was about 195 from where I started off to where we had the accident. When I applied my brakes—about 20 feet before I ran over the dog. It skid that far.

Q. About 175, feet, then, from the time that you started? A. (Witness nods assent.)

Q. Now, you started from a standing stop, and I suppose you were accelerating, you were going faster as
240 you moved along; is that right? A. Well, yes, I was picking up speed a little bit. Couldn't pick up speed, only come a short distance. Those motor cars don't have any speedometer. I couldn't say exact what speed.

Q. That is what I was going to ask you. You don't have any method of telling how fast you were going? A. No, sir.

Q. Well, your best estimation, how fast were you moving at the time you pulled on the handbrake? A. Well, I figure around about 5 or 10 miles an hour.

Q. Now then, coming back to the question that I asked you before—

Mr. Mackall: If I may interrupt, there is one other element; you haven't asked him the grade, whether it was down hill.

By Mr. Meyer:

Q. Any grade there? A. A little down grade, yes, sir; just about the point of the accident, then you start up the grade again.

Q. All right. Now I want to take those same exact conditions that you had that day, as we have described them, both of us together with you. If you had the motor car alone, without the truck behind you, and you were
241 traveling at the same speed that you have indicated, having come from a standing stop, with the brakes in the condition that they were on that motor car, the only brakes that they had, on the grade that was there, with the turn and the low side on your left, as it was at that time, and with the condition of the tracks as it was, misty or moist, or whatever, it was, within what distance could you have stopped the motor car alone with the use of the handbrake? A. At the speed I was traveling, I could have stopped in about 6 to 8 feet.

Q. You are sure of that? A. Yes, sir.

Q. Now, what happened to you when the motor car went over? A. Well, laid there in the ditch until they picked me up. These two men picked me up and laid me on the platform.

. . . . . .

3 Q. Now, Mr. Jackson, continuing with your testimony where we broke into it the other day, will you be good enough to tell the Court and the Jury whether it was your regular custom in your work to pull this truck with the motor car? A. Yes.

Q. How frequently did you have to do that? A. About only once in awhile when we had some kind of material to truck, of course, to cross ties and switches and rails.

Q. Now, when you had that sort of material which had to be moved from place to place in your division, was there any other way that you had to move it except by putting it on the truck and moving it with the motor car pull-
4 ing it? A. There was a way on a work train. Sometimes we would have a work train unload it. Sometimes you put it where you wanted it.

Q. Did you ever have a work train assigned to you? A. No, sir.

Q. On the days when you used the truck did the man ever ride on the truck? A. Well, sometimes when we doubled up gangs, when we had more men than we could get on the motor car we had to put some of them on the truck.

Q. How many men would the motor car accommodate? A. Well, about ten or twelve men.

Q. On the motor car? A. Yes. You see you are not allowed to stand up on the motor car. You would have to sit down.

. . . . . .

6 Q. Was there any other method that you had of taking the coal down to Washington Grove station besides using the truck? A. No, sir.

Q. Approximately how much would you estimate that the load of coal weighed that you took down that morning?

. . . . . .

A. We had just put on what the truck would hold or we could get on it without rolling off.

Q. Would you tell us about how much that weighed? A. Oh, I guess around a ton or more.

Q. Now, how much approximately did the motor car itself weigh? A. Well, I couldn't tell you. I never weighed one.

Q. Can you give us an approximation? A. Yes, a little bit heavier than the truck.

Q. I don't recall whether on Thursday you told us what your estimate was of the weight of the truck empty. A. I told you with the tools we had on the truck and the weight of the truck it was about 1200 pounds.

Q. But empty, without the tools, about how much did the truck weigh? A. Well, it weighed around 800 pounds.

Q. Now, were you required in your use of the motor car or the truck or both to remove it from the main tracks at any time? A. What do you mean, how could we get it off or on?

Q. Did you have to take it off? A. Sometimes we did.

Q. And how was that done? A. By lifting. We always pick up one end of the motor car and walk around over to the rail and go back and lift the other end until it was at a crossing, and then it was off at the crossing.

Q. How often did you have to remove the motor car from the main tracks? A. Well, you had to do it every day to move it. When you got to where you was working at, you had to take it off.

Q. Now, would you have any extra men to help you in doing that or would the same gang that was working with you do that job? A. Well, sometimes we had extra men and sometimes we doubled up the gang.

Q. And how many men did you have with you that
8 day? A. Two.

Q. On that day when you got down to where you were working at Washington Grove crossing, did you remove the motor car from the tracks? A. Sure.

Q. How did you do it that day? A. After unloading the coal at Washington Grove Station and running it on down to the railroad crossing east of Washington Grove, and pull the motor car and truck off and let it sit there the balance of the day.

Q. Now, when you say you pulled it off, do you mean that the men actually pulled it themselves? A. Oh, yes, of course. They pick up one and run around and pull it on off.

Q. Did you help them do that? A. Yes, sir.

Q. The three of you did it? A. Yes, sir.

Q. How about the truck, did you remove that from the main line, too, that morning? A. Yes, sir.

Q. Now, when you finished work that afternoon, did you and your two men physically lift and move the motor car back onto the westbound main track? A. Yes, sir.

9 Q. And the truck also, did you physically lift that up and put it back on the main track?

. . . . . .

19 Cross Examination

By Mr. Mackall:

. . . . . .

22 Q. And this motor car that you were driving at the time of the accident was assigned to you, wasn't it? A. At that section, yes, sir.

Q. That was your track car? A. Yes, sir.

Q. And you worked in the maintenance of way department of the railroad; didn't you. A. That is right.

Q. And this track car was part of the maintenance of way equipment, wasn't it? A. Yes.

Q. This track car you were driving on the day of the accident was a Mudge track car, wasn't it? A. That is right.

Q. How many wheels on this track car ran on the rails? A. Four.

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110 Further Cross Examination

By Mr. Mackall:

• • • • • • • • • • •

111 Q. I see. When we interrupted yesterday, we were talking about the motor track car that was assigned to you; do you remember? A. Yes.

Q. And I believe you stated that was a Mudge belt-drive track car; is that right? A. It was a Mudge, yes, sir.

Q. And that track car is part of the Maintenance-of-Way Department; isn't it, equipment in the Maintenance-of-Way Department? A. Yes, sir.

Q. That is the department you worked in; is that right? A. That is right.

Q. I show you this picture—

The Court: Have it identified.

Mr. Mackall: I ask that this be identified as Defendant's Exhibit No. 10.

(Whereupon the said picture was identified as Defendant's Exhibit No. 10, for identification.)

112 By Mr. Mackall:

Q. Mr. Jackson, is this substantially the same as the motor car you were driving on the day of the accident? A. It looks like it, yes, sir.

Q. That car has four wheels that run on the track; doesn't it? A. Yes, sir.

The Court: Are you asking about Defendant's Exhibit—what is the number?

Mr. Mackall: No. 10.

The Court: Very well.

Mr. Mackall: I am asking him about the car he was using.

By Mr. Mackall:

Q. The motor car you were using the day of the accident, which I believe you said was substantially the same as that car on the picture. A. It looked like the same type.

Q. About how many men does that carry? A. Well, I think you can get about 10 or 12 men on it.

* * * * * * * * * *

Q. Now, those men would sit on this seat along here? A. On each side of it.

113 Q. On each side, with their backs against this rail; is that right? A. Yes, sir.

Q. And their feet on this step down here; is that right? A. That is right.

Q. What are these two levers sticking up? A. One is your clutch; one is your brake.

Q. Can you tell which one is the brake lever? A. The one this way.

Q. This one (indicating)? A. No.

Q. This one (indicating)? A. That is right. You don't have the pencil on the brake lever.

Q. This? A. Yes, that is it.

Q. Suppose we mark that "A." That is the brake lever; is that right? A. That is right.

Q. And the other lever is the clutch lever? A. The clutch lever.

Q. Suppose we mark that "B." Could you carry tools on that car, that motor car? A. Yes, sir.

114 Q. They went underneath the seat? A. Well, would be laid on the running board.

Q. On the running board underneath the seat? A. A little trough there. A board right over the wheel. That is to keep the water and stuff from flying up if the rails are wet. A little trough between that board over the wheels and the frame of the car.

Mr. Mackall: I will ask that this picture be marked as Defendant's Exhibit 11.

The Clerk: Defendant's Exhibit No. 11.

(Whereupon the said picture was marked Defendant's Exhibit No. 11, for identification.)

* * * * * * * * *

Q. Mr. Jackson, this is not an identical motor track car, but that is substantially the same as your car; isn't it? A. Well, it is about the same in the way. The way it is made, it is made different.

Q. Yes, but that is the general idea; isn't it? A. That shows the way you carry tools.

Q. That shows how the men sit on the car? A. Yes, sir.

115 Q. With their backs against that rail and their feet on—you call that—the running board? A. Well, I would. It is a kind of board over the wheels.

Q. I see.

The Court: I don't know whether the Jurors can see it at that distance. I suggest you pass it around and let them see it.

Mr. Mackall: It hasn't been introduced in evidence, Your Honor.

Mr. Meyer: It is all right. Give it to the Jurors now.

(Whereupon the exhibit was passed among the Jurors.)

By Mr. Mackall:

Q. How do you stop that motor car? A. How do you stop it?

Q. Yes. A. Releasing the clutch and pulling back on that brake lever.

Q. How do you release the clutch? A. Shove it forward.

Q. You shove that lever marked B on Defendant's Exhibit 10, you shove that lever forward; is that right? A. I don't understand you about those levers.

Q. Well, I am speaking of this lever right here. A. That is your clutch lever, yes, sir.

116 Q. You shove that forward? A. You shove that forward; that loosens your belt.

Q. That keeps the engine from pulling the wheels; doesn't it? A. Yes, sir.

Q. You pull back on this brake lever? A. That is right.

Q. Now, that motor car was assigned to you; wasn't it? A. Assigned to that section.

Q. You were responsible for the condition of that motor car? A. No, I was not responsible for the condition.

Q. I am sorry, I didn't hear your answer. A. No, sir, I wouldn't say I was responsible for the condition of it.

Q. Well, before you went out each morning, you tested the brakes; didn't you, as you were required to do under the rules? A. Yes, sir.

Q. And if the brakes weren't in good condition, you weren't supposed to take that car out; were you? A. That is right.

Q. The wheels of that car are made of steel; aren't
117 they? A. I judge they are steel.

Q. Of course, they run along the steel rails? A. On top of it.

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Q. Now, at any given speed, you can stop an automobile in a much shorter distance, can't you, than you can this motor car? A. I don't know as you can.

* * * * * * * * * *

Q. Now, how often did you check and test the
118 brakes on this motor track car? A. Well, every time you use it.

Q. Every time you used it? A. Every time you used it, you had to use the brakes.

Q. Now, was the handcar that was involved in this accident also assigned to your section? A. Handcar?

Q. Yes, the push car, the truck.

* * * * * * * * * *

Q. What do you call that four-wheel car that you had on the back of your motor car at the time of the accident? A. We call it a push car, a push truck. A handcar is like

we used to have before we had motor cars, then old pump up and down.

Q. You call it a push car? A. Yes.

Mr. Meyer: Push-truck.

The Witness: Push truck.

119 By Mr. Mackall:

Q. That push truck was assigned to you that was involved in this accident, wasn't it, to your section? A. No, sir, wasn't assigned to me.

Q. Assigned to your section? A. No, push cars not assigned to no particular section.

Mr. Mackall: Please mark this Defendant's Exhibit 12.

(Whereupon the said picture was marked Defendant's Exhibit No. 12, for identification.)

By Mr. Mackall:

Q. Now, Mr. Jackson, is this push truck similar to the one that you were using the day of the accident? A. Yes, sir, except these cross-pieces. Two cross pieces across each end. That is the way they ship them out of the shop.

Q. You mean at the end? A. Come out in here, right over the top of the wheels; one on each end, with strap iron on top of them pieces. Most of these track foremen take that stuff off to make them lighter to handle. I always use it just like the railroad ship it out to me.

Q. I see.

Mr. Meyer: Mr. Mackall, do you mind if Mr. Jackson shows the Jury what the difference was between this exhibit and the car he was using?

120 Mr. Mackall: Suppose I put it down here where we can all see. Now, would you show the Jury, Mr. Jackson, what you were talking about to me?

The Witness: Shall I come down there?

The Court: Yes, step down there.

. . . . . .

The Witness: The car we had had two pieces go right across there, right over the top of the wheels, and a strap on top of it, holding it down. That made it a much heavier car.

(Whereupon the Witness resumed the Witness stand.)

By Mr. Mackall:

Q. That push truck had four wheels; didn't it? A. Yes, sir.

Q. I believe you stated it weighed, your push car weighed approximately 800 pounds empty; is that right? A. About that, yes, sir.

Q. You sometimes used that push car to carry rails; didn't you? A. Yes. When we had rails, we had to use that. That was the only way we had to carry rails on that push truck.

Q. How many rails could you carry on a push
121 truck like that? A. Well, it just depends. Depended on how many you needed.

Q. What is the most you could carry? A. Well, those trucks are built pretty strong. The capacity of those trucks is 10,000 pounds. That is 5 ton.

Q. So you could carry what, about 10 rails? A. Well, those rails, one of those rails weighs pretty close to a ton. They weigh 140 pounds to the yard.

Q. And they are 13 yards long; so that would be approximately 1800 pounds, wouldn't it, if my arithmetic is right? A. I didn't figure it up, but that is what they weigh. They weigh 140 pounds to the yard.

Q. All right. Now, you have never seen a push truck like that with brakes; have you? A. No, sir.

Q. You have never seen a motor track car like that with air brakes; have you? A. No, sir.

Q. Now, you testified you sometimes pulled that push truck with the motor car; is that right? A. That is right.

Q. When you got to the place where you were working, you took the motor car and the push truck off the track?

A. Yes, sir.

122 Q. That was so it wouldn't interfere with the running of the regular trains? A. That is right.

Q. Now, how would a crew of three men get that motor car off the track? How did you do that? A. Only at a road crossing.

Q. What would you do? I believe there are bars at the end, each end of that truck, aren't there, of the motor car? A. Yes, bar across each end of it.

Q. How would you get that motor car off? A. Would pick up the light end of it and walk around. Sometimes two men could lift that up; other man get on the hind end of it, swing back, swing the weight back, and that pulled some of the weight off the front end; walk around and put it on the rail.

Q. I see. Now, in your work, it was essential that you be able to get that car and push truck off the track; wasn't it? A. Sir?

Q. I say, that motor car wouldn't have been any good unless you could have taken it off the track; would it? A. I don't understand what you mean.

Q. Well, you had to take the motor car off the track, didn't you, to clear the track? A. Oh, sure, yes,

123 sir.

Q. And if you couldn't do that, the motor car wouldn't be any good; would it? A. No, sir.

Q. The same thing applies to the push truck; isn't that right? A. Yes, sir; had to get it off.

Q. Now, I believe you said you operated a motor car some forty-four years before the accident; is that right? A. Well, I first started operating motor cars in 1917.

Q. It was your regular practice, wasn't it, to operate a motor car and push car on rainy days, on misty days? Wasn't anything unusual about that; was there? A. Push car, you only use that when you needed it. When you had to use it.

Q. But if you needed it and it happened to be a rainy

or misty day, you went ahead, didn't you? A. If you needed, if you had to use it, yes, sir.

Q. Wasn't anything unusual about operating a motor car and push truck on a rainy day; was it? A. No, sir.

Q. That was just a standard procedure? A. How is that?

Q. That was just a standard procedure? That
124 was the usual way you worked; isn't that right?

. . . . . .

A. The way I usually worked?

Q. Yes. A. Yes, sir.

Q. That was, to take the motor car and push truck, if you needed it, even though it happened to be a rainy day? A. We used the motor car practically every day when we went any distance on the section. Time we worked around close to headquarters, we didn't take it, didn't use either the motor car or the push truck.

Q. But on a rainy day, if you needed the push truck and you needed the motor car, you always used it; didn't you? A. We used it, yes, sir.

Q. Right. Now, on the day of the accident, you were given the job of taking a load of coal to Washington Grove Station and then to work on the track east of Washington Grove Station; wasn't that right? A. That is right.

Q. Now, before you started out on the day of the
125 accident, did you inspect the brakes as you usually did? A. Yes, sir.

Q. And they worked in the usual fashion? A. Yes, sir.

Q. In their normal, natural maner; is that right? A. That is right.

Q. They were in good operating condition? A. Yes, sir.

Q. If they hadn't been, you wouldn't have taken the car out; would you? A. That is right.

Q. In order to find out whether they were in good condition, you made a stop with them; didn't you? A. Well, we had a little track built in the tool house, the rail running out to the side track. We shoved the motor car right

out on the sidetrack and put it on the side track and come down to the main track, the derailing, the switch; and you always had to stop at the derailing; and I would go in to the telephone, get my orders, come on out to the main track. Always know whether you had brakes or not, because you had to stop at the derailing.

Q. I see. Now, you loaded up with tools and the coal before you left; didn't you?

. . . . . .

126 A. The tools, we had them on the motor car, what tools we had, except the wheelbarrow and scoop shovels.

Q. So you had all the tools on the motor car? A. Except the wheelbarrows and scoop shovels, what we load the coal with.

Q. You had two jacks with you on that day? A. Three.

Q. Three. You had a couple of lining bars? A. I always carried more than a couple. I never taken tools—never strip a car; never taken all tools off the car. If a man was out—a lot of them come to the tool house at the next morning last minute, he wouldn't see where his tools on there; got on the job, be somebody short of a tool.

Q. But all the tools you had on that day you were able to put on the motor car except the wheelbarrow and the scoop shovel? A. I could have put them on there, yes, sir.

Q. That wasn't an unusually heavy load for the motor car? A. No, sir.

Q. Or the load of coal and the load of tools wasn't an unusually heavy load; was it? A. No wasn't un-

127 usually heavy load, no, sir.

Q. That push car could carry as much as 10,000 pounds; couldn't it? A. That was the capacity of it, yes, sir.

Q. And I think you testified that you had about a ton of coal on there? A. Well, about. Put on all we could pile

upon it. Some rolled off. I couldn't tell you exact how much it was.

Q. I think you testified you guessed it was about a ton. A. Heavy stuff. Don't take too much coal to weigh a ton.

Q. Now, had you operated the motor car and the push truck on rainy days before with a load similar to this? You had; hadn't you? A. I don't know if I had unless we got caught out and come in.

Q. I am talking about going out. A. No, sir, not the truck.

Q. Now, had you operated a motor track car and push truck before with that amount of tools? A. Yes, sir.

Q. And an empty push truck? A. Yes, sir.

128 Q. You have? A. Yes, sir.

Q. You took the coal to Washington Grove Station and unloaded it; didn't you? A. Yes, sir.

Q. Didn't you get the wheelbarrow from the station? A. We carried the wheelbarrow down from Gaithersburg with the coal.

Q. You took it with you? A. Yes.

Q. Then you went down to Washington Grove crossing and took the car and the truck off the tracks? A. That is right. Stopped about half way between the station and the crossing and unloaded the tools; went down in the center ditch where we were going to work at and went on down to the crossing and unloaded the motor car and truck and walked back up.

Q. At the place where you were working, is there a tower to unload mail bags? A. There was a mail crane.

Q. A mail crane? A. To catch mail, hang mail.

Q. If the train goes by without stopping, they can catch the mail bag off? A. Yes, sir. Started right this end of that, east end of it.

129 Q. You started working just about where that mail crane was? A. Right along about there, went on there and worked east.

Q. Away from the station? A. Away from the station, yes.

Q. Now, at quitting time, you went back and got the motor car and the handcar; didn't you? A. Went back and got the motor car and the truck at quitting time.

Q. Before you did that, you got a clearance from the train dispatcher? A. Oh, yes, always do that.

Q. That is, by telephoning in? A. Yes, sir.

Q. And you found out there was a freight train coming along behind you; didn't you? A. Yes; they told me was a freight due in.

Q. Now, after you loaded up the tools and got the men on, you headed west toward Gaithersburg; didn't you? A. Yes.

Q. And you were going home; you were all through work? A. Yes, sir.

. . . . . .

130 Q. You didn't plan to stop at Washington Grove Station? You were going on through; weren't you? A. Yes, sir.

Q. In other words, you were headed for the barn; isn't that right? A. At Gaithersburg.

Mr. Mackall: Will you mark this.

The Clerk: Defendant's Exhibit 13.

(Whereupon the said picture was marked Defendant's Exhibit No. 13, for identification.)

. . . . . .

Q. Mr. Jackson, what is that picture of, this Defendant's Exhibit 13, for identification? A. That is a picture of Washington Grove Station.

Q. And that is looking east; isn't it? I mean, looking west, excuse me. A. The way I am looking at it, it is west.

Q. That is the way you were going on the day of the accident? A. Yes, sir; going west on this track over here.

Q. On that track there. Suppose we put an arrow
131 there. That is the direction you were going? A. Yes, sir.

Q. And this is the station house here? A. Yes, sir.

Q. And this is the eastbound track? A. Yes, sir.

Q. Suppose I mark that. Now, is that the way it looked the day of the accident? A. Well, as near as I can remember. I can't tell about them trees, the same amount of leaves on it or not.

Q. This is in November, the accident. A. Shows the picture of the tracks and the building looks about the same.

Q. And the station was there and this shed over here and this crosswalk here was the same? A. Yes, sir.

Q. And this curb along the platform? A. Yes, sir.

Mr. Meyer: This arrow is the wesbound track?

Mr. Mackall: Right. Suppose I make that "westbound."

Mr. Meyer: I thought you might.

Mr. Mackall: Mark this.

The Clerk: Defendant's Exhibit No. 14, for identification.

132 (Whereupon the said picture was marked Defendant's Exhibit No. 14, for identification.)

By Mr. Mackall:

Q. Mr. Jackson, this is the same area looking in the opposite direction, this Defendant's Exhibit 14; is that right? That is looking east; isn't it? You have been by there many times, haven't you, Mr. Jackson? A. Yes, that is the same.

Q. And the station looks like this coming from the east? A. Here is your westbound.

Q. Right. And this is the eastbound? A. That is the eastbound.

Q. All right. Suppose I mark those tracks. And you were coming this way? A. Yes, sir.

Q. Suppose I put an arrow back here to show. A. Where did you make that arrow? You made the arrow on the eastbound track.

Q. This is the westbound; isn't it? A. Pardon me. Looked to me like it was in the eastbound.

Q. I want to be sure it is right. Is that right? A. That is right.

Q. O. K. Now, that second picture, Defendant's Exhibit 14, shows the conditions as they were at the time of
133 the accident in that time? A. That looks about the same, yes, sir.

Q. Now, you had taken the push truck with you to haul the coal down to the Washington Grove Station; hadn't you? A. Yes, sir.

Q. And you didn't need that push truck on the way home; did you? A. Well, always—when you take it out, you always take it back to the tool house.

Q. Well, don't you sometimes leave the push truck by the tracks overnight and you lock it up? A. Very seldom unless we are raising track.

Q. If you are going to be working in the same place, you would leave the push truck there overnight and lock it up? A. Very seldom ever know where you are going to work at.

Q. There have been occasions when you left the push truck out overnight? A. It has been left out, yes, sir.

Q. Right. Now, if there had been any reason for it, you could have left that push truck out overnight; couldn't you? A. I will you about the truth, sir. You never know when you are going to have a broken rail. Used to have rail racks, one on every mile of the track.

Q. Have what? A. Rail, emergency rail on every
134 mile of the track. Cut that out, and keep all the rail at the tool house. You have to have a truck at the tool house. Never know when you are going to have a broke rail. Got to have the truck there to load the rail up, get things moving as quickly as possible.

Q. If there had been anything wrong with the push truck, you could have left it out by the track overnight? A. How is that?

Q. I say, if there had been something wrong with the push truck, so you couldn't use it— A. If there had been

something wrong with it, would have had to leave it out; couldn't haul it.

Q. Right. As I understand your testimony, at the time you started home, the rails were wet and slippery; is that right? A. That is right.

Q. And, of course, the wheels of the motor car were wet; weren't they? A. Yes, sir.

Q. They had to be wet, also? A. Sure.

Q. Approaching the scene of the accident was down grade; wasn't it? A. Yes.

Q. Then after you got past where the accident
135 happened, it started up grade; is that right? A. That is up grade.

Q. When you started home with that push truck, with the load of tools you had on board, two men, with the rails wet and slippery, there wasn't any question in your mind that it was perfectly safe to do that?

Mr. Meyer: I object to that, sir. I don't think that is for him to decide. That is for the railroad to decide, Your Honor.

. . . . . .

The Court: I overrule the objection.

. . . . . .

A. Was it safe for me to do that?

Q. Wasn't any question in your mind that it was perfectly safe for you to start home; was there? A. Sure.

Q. You knew it was safe; you thought it was safe? A. Yes.

136 Q. Now, as you approached the station, was the motor pulling? I believe you said you were accelerating as you approached the station. In other words, you were going faster as you approached the station. A. Going fast?

Q. I say, you were going faster—you were trying to get up to your running speed? A. Just about the time—just before the dog started, I was beginning to speed up a little bit.

Q. The motor was pulling as you approached the sta-

tion; wasn't it? You had your clutch engaged? A. Yes.

Q. And the motor was pulling? A. Yes, sir.

Q. Where is the throttle on this picture of the motor car?

The Court: Step down there and show it. Stand to one side, Witness, so the Jurors can see it.

Mr. Mackall: Stand over here.

By Mr. Mackall:

Q. Is this the throttle here? A. Looks like it.

Q. Suppose we mark that "C," with an arrow. Now, as you approached the station, you weren't planning
137 to stop; were you? A. What?

Q. You weren't planning to stop as you approached the station? You were going on home? A. Not before I approached the station, no, sir. I didn't try to stop until the dog started—

Q. Where was the dog when you first saw him? A. When I first saw the dog? When we loaded up the tools, the dog was walking around behind the station there. When we come down, he was standing right along beside the office window there at the station.

Q. Is that the bay window that sticks out? A. Yes, sir.

Q. Where were you when the dog was standing by the bay window? Where was your car, motor car? A. Well, we was passing Washington Grove Station.

* * * * * * * * * * *

Q. At the time the dog was standing by the bay
138 window, where was your motor car, by that crosswalk, that wooden crosswalk across the tracks? A. About that wooden crosswalk.

Q. Well, were you at the crosswalk or past it, or where were you? A. I was just a little beyond the crosswalk.

Q. A little west of the crosswalk? A. A little west of the passwalk, yes, sir.

Q. At that time, I believe you said, the dog seemed well contented; didn't he? A. Well contented, standing there by the window, yes, sir.

Q. Had that dog ever chased your car before? A. No, sir.

Q. Any other dogs ever chased your car? A. Yes, sir; there used to be one there at Upper Hill that used to chase the car.

Q. You weren't expecting any trouble from this particular dog; were you? A. No, sir.

Q. He seemed well contented? A. Well contented is right.

Q. Now, I believe you testified that after that time, you looked forward the way you were going; you stopped
139 watching the dog; is that right? A. I taken my eyes off the dog to look in the direction I was going. Just at that—

Q. Right. And at that time, you were past that wooden crosswalk; you were west of that wooden crosswalk; weren't you? A. Yes, sir.

Q. You were sitting on the hind end of that motor car; weren't you, on the left side? A. Yes, sir.

Q. Did you have your hand on the throttle? A. You don't have to hold your hand on the throttle.

Q. You just had your hand on that rail? A. No, indeed. Just sitting up there. We didn't always hold to that rail.

Q. I see. Sometime after that, Dorsey hollered, "Go back," is that right? A. Just as I take my eyes off the dog to look in the direction I was traveling, Dorsey hollered, "Go back; go back." When I looked around, the dog was coming straight across the eastbound track.

Q. Now, at the time Dorsey hollered, "Go back," how far west of the foot crossing was your motor car? A. Well, just a little past the crossing.

140 Q. About 10 feet? A. No, about 20 feet. As soon as I saw the dog—

Q. The motor car at the time you heard Dorsey say, "Go back," was about 20 feet west of the foot path? A. Well, just about—hardly 20 feet.

Q. I am sorry? A. I say, just about 20 feet perhaps.

Q. About 20 feet. And at that time, you saw the dog crossing the eastbound track; is that right? A. It was coming across, yes, sir.

Q. Now, what part of the eastbound track was the dog on when you first saw it? Was he on the outside rail, the inside rail, or whereabouts on that eastbound track was he when you first saw him? A. Well, he was coming on the south rail.

Q. On the south rail? A. Yes, sir.

Q. That would be the rail nearest the station? A. Yes, sir.

Q. All right. How far was he from the crosswalk, about 20 feet? A. What, the dog?

Q. Yes. He was the same distance west of the
141 crosswalk as you were? A. Well, he might have been a little bit—I couldn't tell you exact.

Q. Well, was he a little bit further west or not as far west or just about the same? A. Well, where we struck the dog at, it was—

Q. I am not speaking about where you struck the dog. I am talking about where the dog was on the eastbound track in relation to that foot path at the time you first saw him on that track. Where was he at that time? A. Well, he was just about come across there right about opposite the motor car.

Q. About opposite the motor car? A. Yes, when I saw him.

Q. And the motor car at that point was 20 feet west of the foot path? A. About 20 feet, yes, sir.

Q. Now, that is when you first saw the dog crossing the track; isn't it? A. Yes.

Q. And that is the first time you had any idea there was any danger; isn't it? A. That is right.

Q. And at that point, when you were 20 feet west of the foot path, that is when you decided you had to do
142 something; isn't it? A. Started to braking it right as soon as I saw the dog coming; I grabbed my brake.

Q. Now, at that point, when you were 20 feet west of the foot path, that is when you decided to put on the brake; isn't it? A. When I saw that, I put the brake on as soon as I seen the dog.

Q. Before you put the brake on, you had to decide to do that; didn't you? A. What?

Q. I said, before you put the brake on, you had to decide to put the brake on? A. I hadn't decided to put the brake on until I saw the dog coming across the track.

Q. Right. When you saw the dog coming across the track, that is when you decided to put on the brake? A. That is right.

. . . . . .

144 Q. Now, Mr. Jackson, after you decided to put on the brake, what did you do? A. Put the brakes on.

Q. You didn't release the clutch; did you? A. Sure.

145 Q. Well, tell me what you did first? A. Released the clutch.

Q. You pushed the clutch forward? A. Yes, sir.

Q. How about the throttle; did you do anything with the throttle? A. Didn't have the throttle to worry about when you released the clutch.

Q. As soon as you released the clutch, you didn't bother about the motor; it wasn't going to pull any more? A. No, sir; didn't bother about the motor.

Q. As soon as you decided to stop, you put the clutch lever forward? A. Forward.

Q. That took about a second to do; didn't it?

Mr. Meyer: I object to that, Your Honor.

The Witness: Wouldn't take you long to do that. As quick as you can snap your finger.

The Court: He can ask him that. The witness can give his estimate.

By Mr. Mackall:

Q. As quick as you snap your finger, like that? A. Yes, sir.

Q. You had to put your hand on the lever? A. Yes, sir.

146 Q. Push it forward? A. Yes, sir.

Q. Take your hand off the lever and put it on the brake lever? A. That is right.

Q. And pull back? A. Yes. The throttle had a piece of metal on there, notch held it in place. Take your hand, slap it out of that notch, and it would fly loose.

Q. That is the throttle you are speaking of? A. The clutch.

Q. Let me understand what you did. Did you actually put your hand on the clutch lever? A. Yes, sir.

Q. And push it forward? A. Yes, sir.

Q. You let go of it; is that right? A. Oh, yes; wouldn't hold onto that.

Q. Let go of it and put your hand on the brake lever? A. Yes, sir.

Q. Pulled it back? A. Pulled it back.

Q. Would you say that was about as fast as three
147 snaps of the finger? A. Done pretty quick.

Q. Snap to put it on, snap to grab the clutch, snap to let go of it, snap to grab the brake lever? A. That is about right.

Q. Just about that long? A. I didn't time myself doing it.

Q. That is about right? About a second, isn't that right, before you had your hand on the brake lever? A. Well, it was hardly a second.

Q. I am sorry? A. It was hardly a second.

Q. Just about?

Mr. Meyer: He said it was hardly a second.

The Court: He said, hardly a second, as I understand him.

By Mr. Mackall:

Q. Then you pulled back on the brake lever? A. Both hands, everything I had; locked the wheels.

Q. Then you skidded along the tracks? A. That is right.

Q. Hit the dog? A. (Witness nods assent.)

Q. And the motor car derailed; didn't it? A. Derailed.

148 Q. After it derailed, did it bump along the ties a little way before it turned over? A. For a short distance, yes.

Q. Now, when you put on the brakes, they operated as they always did; didn't they? A. Yes, sir.

Q. And they locked the wheels? A. Locked the wheels.

Q. At that time, with the wheels locked, you slid along those wet, slippery rails; didn't you? A. Yes.

Q. And you hit the dog? A. I will tell you, I don't know—there was no part of the dog on top of the rails.

Q. I am sorry? A. I don't understand—was no part of the dog on top of the rails. I didn't feel the motor car when it raised up on the dog. The dog was laying between the two rails of the westbound track. I couldn't get up. I didn't see any part of the dog on top of the rails.

Q. That is when you were lying in the ditch between the tracks? A. That is right.

Q. Now, at that point, you were just about opposite
149 the west end of the station; weren't you? A. Yes; I was a little past the west end of the station, yes, sir.

Q. Well, let me ask you this. When you testified in your deposition, you said:

Mr. Meyer: What page, please?

Mr. Mackall: Page 19. In answer to a question where you hit the dog.

. . . . . .

Q. "Question: Approximately where was the dog when your motor car hit him? Answer: He was along in here.

"Question: Down toward the end of that platform? Answer: No, just a little bit—almost right opposite the corner of that station."

Is that what you said?

Mr. Meyer: Read the next question.

150 By Mr. Mackall:

Q. "Question: Just beyond the corner of the station? Answer: Just about the corner of the station. See that window."

Is that right? A. Where the dog was—you mean where the dog was hit at?

Q. Yes. A. It wasn't hit right opposite the window. You don't mean the office window?

Q. No, no, along about the corner of the station. The window by the corner of the station. Isn't that right? Do you want to come down here, Mr. Jackson? I believe when you were testifying, you were looking at this picture, a small copy of this picture.

If you will stand over here, the Jury can see. The window you are speaking of is this window here; isn't it, at the west end of the station? A. Yes, sir.

Q. And you were about opposite that window lying in the ditch; wasn't that right?

Mr. Meyer: That is not the question, if Your Honor please. The question is: Where he hit the dog. He said he was beyond the station when he was lying in the ditch.

151 The Witness: This side of the station.

By Mr. Mackall:

Q. Where you hit the dog was just about opposite that window? A. About opposite that.

Q. All right.

* * * * * * * * * *

152 Now, before you were taken to the hospital, you were lying in the ditch between the tracks; weren't you? A. Yes.

Q. What happened then right after the accident? A. What happened? I told one of the—I asked the man was the motor car clear of the eastbound track. It was hanging on over. And he said, Yes. I said: Well, one of you take

the flag and go back to the crossing—freight following me out of—they was trying to get the car off. I said: You two men can't get it off.

Q. You were concerned about that freight train that was following you; isn't that right? A. Yes, sir.

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156 Recross Examination

By Mr. Mackall:

Q. As you approached the station before the accident happened, you testified that you were picking up
157 speed; is that right? A. No, sir, not picking up speed.

Q. I am sorry, I can't hear you. A. I said just about time I got in that—just before the dog started to cross, I was picking up speed.

Q. You were picking up speed just before the accident? A. Before the accident, yes, sir.

Q. All right. Now, you were on your way home to quit work for that day; weren't you? A. On my way to Gaithersburg, headquarters at Gaithersburg.

Q. About what speed were you planning to run on your way home, about 30 miles an hour? A. Oh, no, sir.

Q. About what speed? A. Well, we never allowed to run the motor cars over 20 miles.

Q. Never over 20. Well, Mr. Jackson, at the time you passed through the station, weren't you traveling about 10 or 12 miles an hour? A. Well, I figure about between 5 and 10.

Q. Well, I am asking you if you weren't actually traveling about 10 or 12 miles an hour? A. Well, I couldn't
158 tell you exact. Those motor cars don't have any speedometer.

Q. Don't have any speedometer? A. Don't have any speedometer, no, sir.

• • • • • • • • • • •

Q. Do you think you were going perhaps 10 miles an hour? A. Perhaps I would be doing around between 5 and 10.

* * * * * * * * * *

179 **Frederick H. Pflaging**

called as a witness by and on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

* * * * * * * * * *

180 Direct Examination

By Mr. Mackall:

Q. State your name, please. A. Frederick H. Pflaging.
The Clerk: Spell your last name, please.
The Witness: P-f-l-a-g-i-n-g.

By Mr. Mackall:

Q. Where are you employed, Mr. Pflaging? A. In Baltimore.
Q. By whom? A. Baltimore and Ohio Railroad.
Q. In what capacity are you employed? A. As an engineer, civil engineer.
Q. How long have you been so employed? A. Oh, around ten years or twelve.
Q. How long have you been a civil engineer? A. Well, since about 1920.
Q. Did you have occasion to examine and make measurements of the locale of Washington Grove Station? A. Yes, sir, I did.

181 Mr. Mackall: I ask that this plat be marked as Defendant's exhibit.
The Clerk: Defendant's Exhibit 16 for identification.

(Defendant's Exhibit 16 marked for identification.)

By Mr. Mackall:

Q. Mr. Pflaging, have you examined this plat known as Defendant's Exhibit 16? A. Yes, sir, I have.

Q. Have you checked this plat as to scale? A. Yes, sir, I have.

Q. How did you do that? A. Well, I checked—

Mr. Meyer: If your Honor pleases, we have no objection. If Mr. Mackall says this conforms to the actual facts, we will accept it without any further testimony.

Mr. Mackall: Thank you.

By Mr. Mackall:

Q. Now, Mr. Pflaging, what is the distance between the two sets of tracks? A. Do you want me to look at my notes?

Q. Yes.

The Court: Do you mean between the rails themselves?

182 Mr. Mackall: Yes. I mean what is the distance in the center of the two sets of tracks between the rails? Can you scale that off from this drawing?

The Witness: Yes, sir.

By Mr. Mackall:

Q. Would you do that, please? A. Yes, sir. There is seven-forty-five.

Q. You mean 7.45 inches? A. That is right—no, 7.45 feet.

Q. Excuse me, feet, I mean. That would be a little less than seven and a half feet? A. That is right. That is between the near rail of this track and the near rail of this track.

Q. Now, is this crossing, wooden platform crossing, correctly placed in relation to the station? A. Yes, sir, it is.

Q. Now, will you place a mark—would you point out the westbound tracks, please? A. Here.

Q. And they are marked westbound track on this plat? A. That is right.

Q. Now, would you point out the eastbound tracks? A. Right here, these two lines right here.

Q. Would you draw a line across the westbound tracks opposite the west end of the station? Now, I will

183 mark that "A."

Can we agree that that is the line opposite the west end of the station?

Mr. Meyer: Sure.

By Mr. Mackall:

Q. Now, will you draw a line across the westbound tracks, that is twenty feet west of this wooden platform crossing. A. This edge, you mean?

Q. From the west edge of this wooden platform crossing twenty feet west.

Q. Is this scale at the bottom of the plat correct? A. Yes, and that should be five feet.

Q. You scale off twenty feet there and mark that.

Now, will you transfer that distance up west of this point here?

Now, will you draw a line across the track at that point, straight across here? A. At right angles?

Q. Right.

All right, now I will mark this second line "B." That line "B" represents twenty feet west of the wooden platform crossing; is that correct?

Mr. Meyer: That is what the witness says.

By Mr. Mackall:

184 Q. Now, Mr. Pflaging, if you wanted to determine other distances on this plat, how could a layman do that? A. Well, here is the scale here. You take scale 10 or 5 or whatever you want, and you lay it along here.

Q. You are using the scale at the bottom of the plat? A. That is right.

Q. All right. A. Then you would transfer it up there, use your relative distance up here.

Mr. Mackall: I have no further questions.

* * * * * * * * * *

**Kenneth Chrissinger**

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

* * * * * * * * * *

186 The Court: Yes. As I understand it, if the question is whether the lack of air brakes was to any extent the cause of this accident—you are claiming that there are no air brakes?

Mr. Meyer: That is correct, sir.

The Court: And as I understand the decision of the Court is that if the accident is in any way attributable to the failure to comply with these regulations, then it is negligence.

Mr. Meyer: And there is absolute liability on the railway?

The Court: Yes, if the absence of the air brakes had anything to do with the cause of the accident to any extent, and for that reason the question is if it had air brakes, how long would it have taken to stop it. I think it is competent.

Mr. Meyer: You are taking it subject to my objection.

The Court: Yes, sir.

(Whereupon, counsel returned to the trial table and the following proceedings were had in open Court:)

Direct Examination

By Mr. Mackall:

Q. Will you state your name, please, and spell it
187 for the reporter? A. Kenneth C-h-r-i-s-s-i-n-g-e-r.

Q. Where are you employed? A. Westinghouse Air Brake Company in New York City.

Q. What railroad brake equipment is manufactured by your company? A. Just about all railroad equipment for freight cars, passenger cars and locomotives and motor cars.

Q. What are your duties with respect to railroad brake equipment? A. To call on railroads and assist them with any problems they have with respect to air brake equipment, to indicate equipment to be applied to new cars being considered and in general to help them with any problems on air brakes.

Q. Do you recommend to individual railroads brake equipment necessary for new rolling stock built by the railroads? A. Yes, I do.

Q. Now, Mr. Chrissinger, is there any limit on the amount of braking power which can be applied to the wheels of the particular piece of track equipment? A. Yes, there is.

Q. And what then determines that limit? A. What determines that is the amount of force that will make a wheel slide. When a wheel locks and slides, it lengthens the stop. So the idea is to apply just enough force
188 that will give you the maximum retardation but will not lock the wheel.

Q. Now, if the brakes on a particular piece of equipment are capable of locking the wheels, what does that fact indicate with respect to brake power available to the operator? A. That indicates that you have more braking power than you can safely use.

Q. Now, if the operator can lock the wheels with the existing brakes, will increasing the brake power increase the efficiency of the brakes? A. No.

Q. What effect will it have? A. It will have no effect, except that if you lock wheels you will lengthen your stop.

Q. Can you say that the more power you have available, the more likely it is that you will lock the wheels? A. Yes, if you exceed the maximum retardation that you can apply to that certain vehicle.

Q. Now, how does moisture—the fact that rails are wet and slippery—affect stopping distances generally? A. Well, it lengthens the stopping distances in this manner; that it lowers the rail adhesion between the wheel and the rail, which limits the amount of force that you can apply to the wheel before it will lock.

189 Q. And the lower the adhesion the less braking power you can safely apply without locking the wheels; is that correct? A. That is correct.

Q. Now, what effect does locking the wheels on wet and slippery tracks have? A. Well, the same effect as on dry rail. It lengthens the stop.

Q. What happens when you lock the wheels on wet tracks? A. Well, it would lengthen the stop more than it would on

dry rail, because the water or material, such as leaves or anything that is on the track act as a lubricant between the wheel and the rail.

Q. Mr. Chrissinger, do you know of any railroad rail equipment equipped with air brakes which could stop that equipment in six to eight feet at a speed of ten miles per hour?

Mr. Meyer: I object to that, your Honor. There is nothing to indicate this man knows anything about this type of equipment.

Mr. Mackall: I am not asking about this type of equipment. I am asking about any type of railroad equipment.

Mr. Meyer: We are not interested, your Honor, in any other type of equipment.

The Court: I overrule the objection.

190 The Witness: Will you restate the question, please?

(The pending question was read by the reporter.)

The Witness: No.

By Mr. Mackall:

Q. What effect would wet and slippery rails have on the answers you have just given? A. Wet and slippery rails will tend to lengthen your stop.

Q. Now, do you know of any railroad rail equipment equipped with air brakes which could be stopped in six to eight feet from a speed of five miles an hour traveling on a slight downgrade with wet and slippery rails? A. No.

Mr. Meyer: I object to that, your Honor, for the same reason.

The Court: Overruled. Proceed. I overrule the objection.

* * * * * * * * * *

191 Q. Now, in your opinion, Mr. Chrissinger, would the motor—strike that. In this case we are concerned with a piece of equipment known as a motor track car.

This is a picture of it, known as Defendant's Exhibit 10. Have you ever seen such a piece of equipment? A. Oh, I have noticed the equipment on railroads. I have never inspected a piece of equipment like that.

TheCourt: Let me speak to counsel at the bench, please.

(Whereupon, counsel approached the bench and the following proceedings were had out of the presence of the jury:)

The Court: Isn't the question simply this; could a vehicle of this kind, eqipped with air brakes, could it be stopped in a shorter distance than with the brakes it has on it?

Mr. Mackall: I was approaching that question now.

Mr. Meyer: In the first place, your Honor, this witness has no basis for any more knowledge of that than the Court or the jury.

The Court: I don't expect that.

Mr. Meyer: He has no experience in it at all.

The Court: I disagree with you. You have not shown by your testimony that had this been equipped with
192 air brakes it could have been stopped in any sort of distance.

Mr. Meyer: We have shown that if it hadn't had to pull a heavy truck, it could have been stopped in a shorter distance—that is the issue—even with its own brakes, even the same type of brakes, your Honor.

The Court: If it could have stopped as quickly with this as with air brakes, then the lack of air brakes would have nothing to do with the accident.

* * * * * * * * * *

193 Q. In your opinion, Mr. Chrissinger, would the motor track car and the hand car involved in this case have been stopped with hand brake equipment in six to eight feet from a speed of ten miles per hour traveling on a slight downgrade on wet and slippery track?

194 Mr. Meyer: That is objected to, your Honor.

The Court: Overruled.
The Witness: In my opinion, no.

By Mr. Mackall:

Q. In your opinion could the motor track car and hand car involved in this case have been stopped with hand brake equipment in six to eight feet traveling on a slight downgrade on wet and slippery rails at the speed of five miles per hour?

Mr. Meyer: That is objected to, your Honor.
The Court: Overruled.
The Witness: In my opinion, no.

By Mr. Mackall:

Q. Now, Mr. Chrissinger, if a piece of rail equipment could be stopped in six to eight feet from a speed of ten miles per hour, how would a stop affect the occupants of a car such as this? A. Well, to make a stop of that nature the acceleration rate is so high, I would expect you would be dislodged from your seat.

Q. What do you mean "dislodged from your seat"? A. Well, thrown out of your seat.

Q. Mr. Chrissinger, what is meant, briefly, by application time with reference to air brake equipment? A. Well, an application of air brake equipment is made
195 by reducing pressure in a line which reduces pressure on one side of the piston which had equal pressure on the other side and your piston moves and connects air volume to a brake cylinder and that volume in the reservoir has to flow through the piping in the air cylinder and apply the brake cylinder. That is what is meant by application time.

Q. Is application time the time from the point when you put the brake lever in the stop position and the time when the brake first start going on the wheels, the brake shoes? A. Yes, although we should clarify that a little. It is the application time from the time you put the brake

valve or operating lever into application position to the time you receive an effective brake. What I mean by an effective brake, it will take probably ten pounds of cylinder pressure to get the brake shoes up against the wheels and that is effective.

Q. Now, what is the application time for air brake equipment?

Mr. Meyer: I object to that, your Honor.

The Court: I overrule the objection.

The Witness: Well, for modern, light-weight coach equipment, the application time on the minimum side would be a second and a half.

Q. Do you know of any railroad equipment which
196 has a shorter application time than the modern light-weight coach?

Mr. Meyer: I object to that, your Honor.

The Witness: No.

By Mr. Mackall:

Q. How many feet per second, Mr. Chrissinger, does a car going ten miles per hour travel?

The Court: That is a mere matter of arithmetic.

Mr. Mackall: It is a mere matter of arithmetic, but I think I have to establish that, and I think the witness is qualified to testify.

The Court: I think anybody is qualified to testify to that.

Mr. Mackall: I think so, too.

The Witness: The miles per hour times the constant 1.467, which would give you about 14⅔ feet per second.

By Mr. Mackall:

Q. And at five miles per hour, how far would a car travel in one second? A. About 7⅓ feet.

The Court: Is a rough approximation about a time and a half; isn't it?

The Witness: The rule of thumb is one and a half.

By Mr. Mackall:

Q. How far would a car going ten miles per hour travel between the time the brake lever is put in the stop
197 position and the time that the brakes begin to have any effect whatsoever?

Mr. Meyer: I object to that, your Honor.

The Court: I overrule the objection.

The Witness: It would be approximately twenty-nine feet or a little better.

By Mr. Mackall:

Q. Now, I would like to ask you the same question at a speed of five miles per hour. How far would the car going five miles an hour travel between the time the brake lever is put in the stop position and the time the brakes begin to have any effect whatsoever?

Mr. Meyer: Objected to, your Honor.

The Court: Overruled.

The Witness: Approximately 14⅔ feet.

By Mr. Mackall:

Q. What is known as operator's reaction time? What is that? A. Well, operator's reaction time is taken as the time that the operator first becomes aware of a situation and then his reaction time to reach the brake valve to begin his application.

Q. Is that the time it takes the operator to decide to put on the brakes and actually move the lever? A. It is the time that it takes for the man actually to de-
198 cide to put on the brakes.

Q. And actually start to move the lever, is that right? A. That is right.

Q. Now, what reaction time—strike that. What is the reaction time for an average individual as used by your company?

Mr. Meyer: I object to that, your Honor.

The Court: Overruled.

The Witness: Well, we use in the neighborhood of a second to a second and a half.

By Mr. Mackall:

Q. All right. How far would a car—strike that. How far would a car going ten miles per hour travel during the operator's reaction time?

Mr. Meyer: Objected to, your Honor.

The Court: Overruled.

The Witness: Well, it would be between fourteen and two-thirds and twenty-one and two thirds feet.

By Mr. Mackall:

Q. Now, how far would such a car—strike that. How far would a car going five miles per hour travel during the operator's reaction time?

Mr. Meyer: That is objected to, your Honor.

The Court: Overruled, although I think it is useless.

. . . . . .

199 The Witness: Well, it would be between seven and a third and ten and a half feet.

. . . . . .

200 Q. The question is how far would a car going ten miles per hour travel between the time that an individual realized it was necessary to apply the brakes to the time the brakes had any reaction whatsoever? A. It would be approximately forty-two feet.

Q. How far would it travel under the same situation at five miles per hour?

Mr. Meyer: Objected to.

The Court: Overruled.

. . . . . .

The Witness: Approximately 21 feet.

. . . . . .

202 Cross Examination

By Mr. Meyer:

Q. Mr. Chrissinger, a light-weight passenger car is the smallest railroad equipment that your company works on? A. No, I wouldn't say that. You mean small in weight?

Q. Yes. A. Weight, length or—

Q. Yes, weight. A. Weight, I would say would be maybe a freight car.

Q. Freight car. Does the weight of the vehicle have anything to do with the stopping distance? A. No, for this reason; the heavier a vehicle the more rail adhesion you have simply because there is more pressure, which is pushing that wheel against the rail, and the more braking power you can safely put to that car. The braking power is always supposed to be known as the braking ratio which is the light weight of the car to the force applied. In other words, the heavier the vehicle, the more breaking force you can use.

Q. So you could stop a big heavy diesel engine in the same distance you could stop a light passenger car?

203 A. That is right.

Q. Now, could you stop a diesel engine in the same distance that you could stop the same engine pulling ten cars behind it? A. You will have to clarify that. Do you mean with air brakes cut through the ten cars or without?

Q. I am talking about the diesel engine having the air brakes but the cars not having any brakes. A. No, you could not stop it.

Q. You couldn't stop it, so that the weight of the cars behind it would have something to do with the distance within which you could stop the engine with the air brakes? A. Any unbraked portion of your train is going to have an effect on your stopping distance.

Q. Let's clarify that very, very simply. Any unbraked portion of equipment behind the motored unit will add to

the stopping distance of the entire train, let us say, wouldn't it? A. Oh, yes, very definitely.

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204 Q. And there must be some reason why they put air brakes on the trailers pulled by those tractors; isn't there? A. Yes, sir.

Q. What is the reason for that? A. Well, I am not qualified to talk, except from the point of view of logic that anybody would be qualified to talk. I don't want to set myself up as an expert on trucks.

Mr. Mackall: I object.

• • • • • • • • • • •

The Court: I sustain the objection.

By Mr. Meyer:

Q. In other words, there are sanding apparatus on the vehicles that when the brake is applied dump the sand in front of the wheels? A. There is a sanding ap-
207 paratus on locomotives. There is some on some light weight cars.

Q. Will that help stop the vehicle? A. Yes.

Q. Now, when you talked about hand brakes, in answer to some of Mr. Mackall's questions, are they air brakes? A. No, they are not.

Q. What experience do you have with hand brakes? A. No experience.

• • • • • • • • • • •

Q. What about if the sand is dropped before the wheel is locked? A. That may have the tendency to keep the wheels from locking.

• • • • • • • • • • •

208 Further Direct Examination

Mr. Mackall: Your Honor, I am going to need the help of the reporter in using this witness now. I would like her to give me these stopping distances, or rather the distances that Mr. Chrissinger testified a car traveling at five and ten miles an hour would travel, which was the last

question I asked on that matter, to get the number of feet and also the one question preceding that.

. . . . . .

210 "Q. The question is how far would a car going ten miles per hour travel between the time that an individual realized it was necessary to apply the brakes to the time the brakes had any reaction whatsoever.

"A. It would be approximately forty-two feet.")

By Mr. Mackall:

Q. Mr. Pflaging, will you take your scale and scale from that scale on that plat a distance of forty-two feet? A. From where?

Q. I just want the distance forty-two feet. A. Forty-two feet from where?

Q. Will you mark on this piece of paper to forty-two feet on this scale here? Use this scale here. A. I don't know if that is exactly accurate. This is forty feet right there.

Q. It is forty feet from here to here? A. Yes,

211 it is.

Q. I want you to mark on the edge of this paper. Don't use your scale. This should be over here a point, shouldn't it, over here? All right get it exactly right now.

Would you watch this, please, Mr. Meyer?

Mr. Meyer: I assume that being an engineer he knows how to scale forty-two feet.

Now, would you take that distance and cut a strip from this piece of red material that is forty-two feet long from this end.

The Court: You had better have that identified now.

Mr. Mackall: I am going to take this strip that Mr. Pflaging just cut off showing a distance of forty-two feet and put it on that plat here.

The Court: You had better have that identified now.

The Clerk: That will be Defendant's Exhibit No. 16-A.

(Defendant's Exhibit 16-A marked.)

The Court: What is the scale of that map?

The Witness: One inch equals five feet.

The Court: Five feet to the inch.

The Witness: I am used to using this scale.

Mr. Mackall: Let the record show that I am placing this red strip on the plat with the left end opposite—strike that. I am placing this red strip with the right end
212 opposite the east end of this wooden platform crossing.

Now, will you read the next question and answer, please?

(Whereupon, the reporter read the question and answer, as follows:

"Q. How far would it travel under the same situation at five miles per hour?

"A. Approximately 21 feet.")

By Mr. Mackall:

Q. Now, that is half the forty-two feet, isn't it, Mr. Pflaging? A. Yes, sir.

Q. Will you take this piece of paper that you have marked forty-two feet and fold it so you get half that distance? A. Do you want me to cut it?

Q. No.

Now, will you mark where that fold is? Will you use that as a guide and cut off a strip of this red material 21 feet long?

Mr. Mackall: Mark this Defendant's Exhibit 17.

The Clerk: That will be defendant's Exhibit 17, for identification.

(Defendant's Exhibit No. 17 marked for identification.)

213 Mr. Mackall: Let the record show that I am going to place this on the plat with the left end of this at the line designated at Position "A."

* * * * * * * * * * *

215 Mr. Mackall: I have another witness from the Justice Department, Mr. Leo Meltzer. Perhaps we can save a little time.

If called, he would testify that the Justice Department, under the law, has the function of prosecuting violations of the Safety Appliance Act; and since he has been with that part of the Justice Department—and he is with the branch of the Department which is concerned with prosecuting such violations—the Department of Justice has never prosecuted any cases involving the type of equipment involved here for violation of the Safety Appliance Act.

If we could stipulate that, we can save some time.

The Court: You want to stipulate that the Department has never prosecuted any case for violation of these particular provisions of the Act; is that it?

Mr. Meyer: On a motor car.

Mr. Mackall: As to the equipment involved in this case.

Mr. Meyer: I think I will stipulate that he will so testify. Will you state how long he has been with the Department?

Mr. Mackall: Between ten and fifteen years.

Mr. Meyer: We will so stipulate.

* * * * * * * * * *

274 **Court's Charge to Jury**

275 PROCEEDINGS

The Court: Members of the Jury, the Plaintiff, Daniel T. Jackson, has brought this suit against the Defendant, the Baltimore and Ohio Railroad Company, seeking to recover compensation for injuries which he claimed resulted from the fault of the Railroad Company.

His claim is based on two grounds: The first ground is the ground of negligence: that is, that he was injured by the negligent act or failure to act of the Defendant.

Now, negligence is simply this: It is a failure to exercise that degree of care which an ordinary prudent person would exercise at the particular time, place, and under the particular circumstances. Generally speaking, a person who is injured by that negligent act or failure to act is entitled to recover compensation from the one who was negligent.

Now, it is the obligation of the Railroad Company to furnish equipment for use of its employes which is reasonably safe for the purpose for which it was furnished, and for the purposes for which it was used.

Generally speaking, if the railroad fails to do that, and by reason of that failure, the employe is injured, the employe has a right to recover compensation.

276 Now, there is no presumption of negligence from the mere fact that an accident happened. The burden of proof is upon the Plaintiff to prove that the accident resulted from the negligent act of the railroad; that is, from the failure to furnish equipment that was reasonably safe for the purpose for which it was to be used; and if the Plaintiff was injured in consequence of that failure, then he is entitled to recover.

There is no question of what you may have heard in other negligence cases of contributory negligence or assumption of risk. The only question for you to determine there is whether or not the railroad was negligent, and the accident occurred by reason of that negligence.

Now, the other ground of recovery is based upon an Act of Congress known as the Safety Appliance Act.

Congress has required railroads to furnish certain equipment for the use of the operation of the railroad. Among those that are necessary—as in this particular case—was that the law required the railroad to have hand brakes on this truck, and to have brakes on the motor car controlling the brakes on both the truck and the motor car.

The evidence clearly showed, and it is admitted that this equipment was not furnished; and you will find, therefore, that if by reason of the failure to furnish that

277 equipment, this accident happened, that that was the proximate cause or a contributing cause of the accident, then the Railroad is liable to the Plaintiff; and no negligence on the part of the plaintiff, himself, is a bar to his right to recover under the Railroad Safety Appliance Act.

However, if you find for the Plaintiff on the first claim of negligence, then any contributory negligence on his part might be considered, not as a defense to the action based on negligence, but to be considered by you in determining the relative negligence of the two in determining the amount of compensation for the Plaintiff.

Now, these are facts for you to determine; for you, alone; for you are the exclusive judges of the facts; and you are not bound by any statement of my own as to the facts in the case. They are for you to determine and you, alone.

Your duty is to follow my instruction as to the law, but the facts are your province and not mine.

Now, you are the exclusive judges of the credibility of the witnesses who have testified before you. You should take into consideration the manner of testifying, whether a witness is frank or evasive in answering, whether the testimony of a witness is consistent as a whole, or consistent or inconsistent with statements which the witness may have made at some previous time, whether under oath or not.

278 You should consider the interest that a witness has in the result of this case, whether as a party, or by reason of friendship or any other fact, or any fact developed in the testimony which your minds might tend to bias or color the testimony of a witness.

You heard the testimony of experts giving their opinions as to certain facts. Now, as to those opinions, you are not bound by the opinion of an expert; but you should give it such weight as you think is due it, in view of the knowledge and experience of the expert.

Now, the burden is upon the Plaintiff to show the liability of the Defendant, either on the question of negligence, which I discussed at first, or by reason of the violation of the Safety Appliance Act. That is to say, whether or not the evidence as a whole, in your minds, bears favorably one way or the other.

It is not a question, as in a criminal case, of showing the proof of a fact beyond a reasonable doubt; but is simply the greater weight which the evidence has one way or the other.

Now, taking all these matters into consideration, consider first on the question of negligence alone whether or not the Plaintiff has shown that the Defendant was negligent in furnishing the equipment which it did for
279 the purpose for which it was to be used; and whether or not that fact was the cause, the proximate cause, or a contributing cause of the injury to the Plaintiff.

If the Plaintiff has not shown that by the greater weight of the evidence, why, of course, he could not recover under that claim.

Then consider the other question, the Safety Appliance Act. The burden of proof there is upon the Plaintiff to show that the failure to furnish the brakes, the hand brakes on the truck, and the brakes on both vehicles which could be controlled on the motor car, whether that was a cause or a contributing cause of the accident.

If the Plaintiff has not shown that by the greater weight of the evidence, he could not recover under that claim.

But if you find that the Plaintiff has sustained or shown by the greater weight of the evidence that his injuries were caused by the negligent act or failure to act of the Defendant, or by failure to equip this motor car and truck with brakes such as I have described, then your verdict should be for the Plaintiff.

If he has not shown either that his injuries were caused by the negligent act or failure to act on the part of the Defendant, or by the failure to provide this motor car and truck with the equipment required by law, then
280 your verdict should be for the Defendant.

If you find for the Plaintiff, you should fix such sum of money as in your minds would fairly, reasonably and adequately compensate him for the injuries which he suffered, for his mental and physical suffering, for any

loss of wages, or loss of earning power; and if that is likely to continue in the future, take that into consideration in fixing the amount of his recovery.

If you find for the Plaintiff solely on the ground of negligence, if you find the Defendant has shown by the greater weight of the evidence that the Plaintiff, himself, was negligent, and that his negligence was the contributing cause of the accident, then you should take that into consideration in balancing the negligence of the two, in determining the amount of recovery to the Plaintiff.

If counsel have any further objections, set to the bench and I will hear them.

* * * * *

The Court: I will ask the Jurors to retire and consider their verdict. Select one of your members as a foreman or forewoman, as the case may be; and when you have agreed upon a verdict, notify the Marshal at the door.

* * * * * * * * * *

**Defendant's Exhibit 18**

Filed December 9, 1955

STIPULATION

It is hereby stipulated by and between the parties to this action through their respective counsel of record, subject to objection as to admissibility, relevancy and materiality, that if called as a witness, Mr. R. G. May would testify as follows:

1. That he is Vice-President, Operations and Maintenance Department, of the American Association of Railroads.

2. That his duties are principally in connection with operations and maintenance problems of the American railroad industry.

3. That he has been connected with the American railroad industry for twenty-seven years.

4. That he is familiar with the type of railroad motor track cars and hand cars customarily used in the railroad industry in Maintenance of Way departments.

5. That he is familiar with the type of motor track car and hand car involved in this case.

6. That railroad motor track cars customarily used in the railroad industry in Maintenance of Way departments have four wheels; are capable of being removed from the rails by a crew of three or more men; are equipped with hand brakes and are not equipped with power brakes.

7. That the type of railroad motor track car involved in this case is substantially the same as the type of railroad motor track car customarily used in the railroad industry in Maintenance of Way departments.

8. That there are approximately sixty thousand of such railroad motor track cars currently in use in the American railroad industry.

9. That hand cars customarily used in the railroad industry in Maintenance of Way departments are equipped with four wheels; two axles; wooden frames; are capable of being towed behind railroad motor track cars and are not equipped with any kind of brakes.

10. That the type of hand car involved in this case is substantially the same as the type of hand car customarily used in the railroad industry in Maintenance of Way departments.

MILFORD MEYER
Milford Meyer
*Attorney for Plaintiff*

LAIDLER B. MACKALL
Laidler B. Mackall
*Attorney for Defendant*

3 **Excerpts from Defendant's Exhibit 19**

**Wilbur J. Barnes**

being first duly sworn by the notary public, was examined and testified as follows:

Direct Examination

By Mr. Mackall:

Q. State your name, please. A. My name is Wilbur J. Barnes.

Q. Where are you employed, Mr. Barnes? A. I am presently associated with the Locomotive Inspection Service of the Interstate Commerce Commission in the capacity of supervising engineer.

Q. How long have you been employed at the Interstate Commerce Commission? A. Since June 12th in 1926.

Q. What are your duties as a supervising mechanical engineer? A. I have charge of all engineering in connection with the administration of the Locomotive Inspection Act and also of the specifications and alteration reports required to be filed under rules approved by the Commission governing all locomotives in use on common carrier lines within the continental United States.

Q. Briefly, what are those reports that you speak of?

4 A. The specifications are documents showing the pertinent construction features of the locomotives and of steam boilers on steam locomotives.

Just to continue, they also cover the pertinent constructional features of locomotives propelled by power other than steam.

Q. What use is made of these reports by the Commission? A. These reports are used to determine whether the details of the construction are in accordance with the requirements of rules approved by the Commission.

Q. Does the Boiler Inspection Act have any application to these reports? A. The reports are required by rules formulated under the Act and approved by the Interstate Commerce Commission.

Q. Is your Department concerned with railroad equipment other than locomotives? A. No.

Q. * * * Has any Interstate Commerce Commission order been issued concerning railroad motor track cars?

Mr. Meyer: That is objected to.

* * * * * * * * * * *

5 A. At the time of the promulgation of rules covering locomotives other than steam—

Q. Let me interrupt you for a minute. I am speaking of a rule or order of the Commission in force on November 1, 1951.

Mr. Meyer: That is objected to for the reason stated.

The Witness: To repeat, at the time of the approval of rules and instructions covering locomotives other than steam an order was issued by the Commission approving these rules and establishing the effective date.

* * * * * * * * * * *

Q. Now, are you familiar with any rule or order of the Commission effective on November 1, 1951, which mentioned railroad track cars?

Mr. Meyer: That is objected to for the reason mentioned.

The Witness: It was, and the order referred to in answer to the previous question established the definition of a locomotive and a motor car.

* * * * * * * * * * *

6 Q. Do you have a copy of that order with you? A. I have.

Q. Where did you get that order you have here? A. This order is part of the records of the Section of Locomotive Inspection.

Mr. Maekall: Will the reporter mark this as Defendant's Exhibit No. 4 for identification?

(The aforementioned document was marked Defendant's Exhibit No. 4 for identification.)

By Mr. Mackall:

Q. Mr. Barnes, will you read the first two paragraphs of this order, just these two. A. "At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 14th day of December, A. D. 1925."

Then the second caption reads:

"In the matter of rules and instructions for the
7 inspection and testing of locomotives propelled by other than steam power in accordance with the Act of February 17, 1911, amended March 4, 1915, June 26, 1918, and June 7, 1924."

Q. Mr. Barnes, what are those acts? How is that act designated? A. It is generally referred to as the Boiler Inspection Act, amended.

Q. Will you read the second paragraph appearing on page 2 of this document, Defendant's Exhibit No. 4 for identification? A. "A motor car is a self-propelled unit of equipment designed to carry freight or passenger traffic, and is not to be considered a locomotive."

Q. Now, Mr. Barnes, was this order in effect on November 1, 1951? A. Yes, it was.

Q. Has your department ever inspected, issued any regulations or taken any action with respect to railroad motor track cars? A. No, sir.

* * * * * * * * * * *

10 Now, just to conclude, in accordance with the stipulation previously made, the motion is made to strike the witness's testimony completely.

* * * * * * * * * * *

**Defendant's Exhibit 4**

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 14th day of December, A. D. 1925.

In the Matter of Rules and Instructions for the Inspection and Testing of Locomotives Propelled by Other Than Steam Power in Accordance With the Act of February 17, 1911, Amended March 4, 1915, June 26, 1918, and June 7, 1924.

*It appearing,* That the act of June 7, 1924 (Public No. 277, 68th Cong.), amending the act of February 17, 1911, makes said act apply to and include all locomotives used upon the line of any common carrier by railroad, or partly by railroad and partly by water, within the continental United States subject to the interstate commerce act, as amended, excluding street, suburban, and interurban electric railways unless operated as a part of a general railroad system of transportation. The act of February 17, 1911, as amended, requires among other things, that each carrier subject to its provisions shall file its rules and instructions for the inspection of locomotives and tenders with the chief inspector within three months after the approval of the act and after hearing and approval by the Interstate Commerce Commission such rules and instructions with such modifications as the commission requires shall become obligatory upon such carrier: *Provided, however,* That if any carrier subject to this act shall fail to file its rules and instructions, the chief inspector shall prepare rules and instructions not inconsistent therewith for the inspection of locomotives and tenders to be observed by such carrier, which rules and instructions being approved by the Interstate Commerce Commission and a copy thereof being served on the president, general manager, or general superintendent of such carrier, shall be obligatory and a violation thereof punished as provided in said act;

*It further appearing,* That by orders dated June 2, 1911, September 12, 1912, June 9, 1914, October 11, 1915, June 30, 1916, November 13, 1916, December 26, 1916, September 20, 1917, December 17, 1917, and April 7, 1919, we have approved rules and instructions for the inspection and

testing of locomotives propelled by steam power. It now becomes necessary under the amended act to approve rules and instructions for the inspection and testing of locomotives propelled by other than steam power which, for the purposes of this order, will be distinguished from multiple-unit cars and similar self-propelled vehicles designed to carry within themselves freight or passenger traffic by the definitions given in the classification of Train-Miles, Locomotive-Miles, and Car-Miles for Steam Roads approved by our order of May 19, 1914, as follows:

A locomotive is a self-propelled unit of equipment designed solely for moving other equipment.

A motor car is a self-propelled unit of equipment designed to carry freight or passenger traffic, and is not to be considered a locomotive;

*And it further appearing*, That conferences participated in by representatives of the carriers, representatives of the employees, and the chief and assistant chief inspectors have been held and a code of rules and instruction for the inspection and testing of locomotives propelled by other than steam power has been prepared and agreed to by all parties:

*It is ordered*, That rules and instructions for the inspection and testing of locomotives propelled by other than steam power, as follows, numbered consecutively from 200 to 261, inclusive, and 300 to 337, inclusive, together with cuts, tables, drawings, and forms numbered 1-A, 1-B, 2-A, 4-A, 4-B, 19-A, and 19-B, be, and the same are hereby, approved, and from and after the first day of July, 1926, except as otherwise specified, shall be observed by each and every common carrier subject to the provisions of the act of Congress aforesaid as minimum requirements: *Provided*, That nothing herein contained shall be construed as prohibiting any carrier from enforcing additional rules and

instructions not inconsistent with the foregoing tending to a greater degree of precaution against accidents.

By the commission.

GEORGE B. MCGINTY,
*Secretary.*

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3 **Excerpts from Defendant's Exhibit 20**

**James O. Tolbert**

being first duly sworn by the notary public, was examined and testified as follows:

Direct Examination

By Mr. Mackall:

Q. State your name, please. A. My name is James O. Tolbert.

Q. Where are you employed, Mr. Tolbert? A. I am employed in the Bureau of Safety and Service of the Interstate Commerce Commission.

Q. How long have you been employed in the Interstate Commerce Commission? A. Since March 10, 1908.

Q. What are the functions of the Safety Bureau?

* * * * * * * * * *

A. Well, it is to administer the Safety Appliance Acts and the Hours and Service Acts, and what we call the Signal Inspection Bureau. The Safety Applicance Acts are the acts that require automatic couplers, hand brakes, air brakes, and so forth, on railroad rolling stock; that is, engines, tenders, cars and trains.

Q. In what capacity are you employed? A. I am em-
ployed as a trial attorney in the enforcement of
4 these acts just mentioned.

Q. What are your duties, briefly, as a trial attorney for the Bureau of Safety? A. Well, on a safety appliance case, when the case is once set for trial, I proceed to the place of trial and work with the United States

Attorney. In most instances he turns the case over to me completely and I get the case ready for trial by interviewing the witnesses and conduct the trial to its conclusion.

Q. The case is normally brought by the Department of Justice, isn't it, though? A. In the name of the Department of Justice upon information furnished by the Interstate Commerce Commission.

Q. Do you have any function in deciding whether prosecution shall be brought? A. Very much so. In the first place, the evidence of these violations is submitted to the Commission by our field inspectors, and they come to me for a review to determine whether or not I think the acts apply, and if they do, whether they have been violated, and the cases are summarized. Before they go to anybody else for approval, I sign the recommendation sheet whether to prosecute or not to prosecute.

Q. What function does the Interstate Commerce Commission have with respect to the Safety Appliance Act? A. Well, of course, the Interstate Commerce Commission has been designated by law to administer the law, and under what we call the 1910 act the Commission was given a duty to specify the number, the dimensions, and the location and manner of application of these various appliances provided for by the act, the purpose of that being that these appliances would be at the same place and of the same dimensions on every car in the country.

Q. How are these standards published by the Commission? A. Well, the Commission issued its order of March 13, 1911, which we call the Safety Appliance Standards. They have been amended to a very small degree, and I think in a few years later, to provide for the use of metal running boards in addition to the wooden running boards, and, of course, that order is published in the Federal Register and I suppose every railroad in the country has copies of it.

Q. How was this order arrived at originally or in the course of its amendment? A. It was a rather long drawn-

out procedure. The representatives of the Interstate Commerce Commission, who were employees of the Bureau of Safety—they, of course, had been in charge of this law for a number of years, and they drew up what I would call a tentative order. They went out in the field and in the yards and watched these appliances being used, and they were very careful to specify what they considered the proper dimensions, but anyway, they prepared a tentative order.

Then this order was sent to the various railroads and to the various representatives of the train service, train and engine service employees of the railroads for their comments, and then they all got together and they had several conferences, and then they ironed out everything that was possible to be ironed out. Then the matter was set for hearing before the full Commission, and these various organizations were there at the hearing through the representatives. After some two or three days hearing, the Commission came out with its order of March 13, 1911.

Q. Do you have a copy of that Safety Appliance Standards Order with you? A. Yes, I do. I hope I brought it with me. This is that order. On the outside it says "Interstate Commerce Commission, United States Safety Appliance Standards, Order of the Commission," and it was reprinted in 1946. The original order is the order of March 13, 1911.

Q. Was that order in effect on November 1, 1951? A. It was in effect on that date and still is.

(The aforementioned document was marked Defendant's Exhibit No. 5 for identification.)

By Mr. Mackall:

Q. Mr. Tolbert, what equipment does that order cover, briefly?

* * * * * * * * * * *

7 A. In the order, there are several different headings. The first one is entitled "Box and other House Cars," and they go ahead and specify the different appliances and where they are to be placed.

Q. Would you characterize generally the equipment that order covers?

Mr. Meyer: Objected to, and move to strike out the prior answer.

* * *

The Witness: The order covers what is known in railroad parlance as standard equipment; that is, box cars, flat cars and gondola cars and tank cars, cabooses and locomotives used both in what we call road service and switching service. That is in general terms what it covers.

* * * * * * * * * * *

Q. Does that order cover motor track cars such as are used by maintenance of way departments and four-
8 wheel hand cars, push cars or trucks? A. It does not.

Mr. Meyer: Objected to for the reason stated and move to strike the answer.

* * * * * * * * * * *

Q. Do you have any official document from the Interstate Commerce Commission stating whether this order we are speaking of refers to railroad motor track cars or four-wheel push cars or trucks?

* * * * * * * * * * *

Mr. Meyer: Objected to.

* * * * * * * * * * *

Q. Do you have anything from the Commission such as I have described?

Mr. Meyer: Objected to.

The Witness: Nothing as applied to that type of cars. I do have in my possession a letter that under date of May 5, 1955, was addressed to your firm, enclosing a copy of this order of March 13, 1911, with certain comments,

and that letter is signed by the Secretary of the Commission, Harold D. McCoy.

* * * * * * * * * * *

Mr. Mackall: May I ask the reporter to mark that as Defendant's Exhibit 6 for identification?

(The document above referred to was marked Defendant's Exhibit No. 6 for identification.)

* * * * * * * * * * *

9 Q. Mr. Tolbert, will you read that last two paragraphs in that letter, please?

Mr. Meyer: Objected to.

The Witness: "A copy of that order is attached from which you will note that the Commission carried out this mandate as to box and other house cars, hopper cars, gondola cars, flat cars, tank cars, caboose cars, passenger train cars, locomotives and cars of special construction.

"No specifications were issued for any other types of cars."

* * * * * * * * * * *

Q. How does the Interstate Commerce Commission keep track of railroad equipment? A. Through a force of fifty-seven field inspectors, all of them experienced railroad men.

Q. How do they operate? A. Well, they go around from within their designated territory from railroad yard to another and go out in the yard and inspect this equipment, and after the inspection is concluded they make a report to us as to what they find.

Q. What is that report called? A. That is called their regular inspection report.

Q. Go ahead. I didn't mean to interrupt you.

10 A. Then at the end of the month these reports are assembled according to railroads and a copy of them are transmitted to the president or other responsible officer of the railroad for such action as is necessary.

Q. Do you keep informed concerning the contents of regular inspection reports? A. Oh, yes.

Q. Do these regular inspection reports ever mention the type of equipment involved in this case; namely, motor track cars and push cars?

Mr. Meyer: That is objected to for the reasons stated.

The Witness: They do not.

* * * * * * * * * *

Q. What is a violation report? A. Well, that is when any of this equipment, this standard equipment is not equipped in accordance with the Safety Appliance Acts, or that equipment on there is out of repair and if the car or equipment is moved in that condition that constitutes a violation of the Safety Appliance Acts.

Q. Do you keep informed concerning the contents of violation reports? A. I do, because I think I see every one of them that comes in.

11 Q. Do these violation reports ever mention the type of equipment involved in this case?

Mr. Meyer: Objected to.

The Witness: They do not.

* * * * * * * * * *

Q. If an employee operating the type of equipment involved in this case were concerned about its safety, how could he bring his concern to the attention of the Commission?

Mr. Meyer: Objected to.

The Witness: Well, I think the thing to do, like anybody else does, is just to sit down and write the Commission a letter.

* * * * * * * * * *

Q. Does the Commission receive such letters concerning standard railroad equipment? A. Not to my knowledge, and I think if they did it would come over my desk.

Q. I am speaking of standard railroad equipment? A. Oh, yes, we get letters constantly, and in fact, that is where we get a good many of our tip-offs that the law is being violated.

Q. Now, has your Bureau ever received any letters complaining about the safety of the type of equipment
12 involved in this case?

Mr. Meyer: Objected to.

The Witness: Not to my knowledge. I think I would know it if it came in.

* * * * * * * * * *

Q. Generally what equipment is a car subject to the Safety Appliance Act required to have?

* * * * * * * * * *

13 Q. How about automatic couplers? A. Well, in all of the cars, no matter what type they are, they are required to have automatic couplers.

Q. And generally how would you describe an auto-
14 matic coupler? A. That can be defined, I think, very largely by using the language of the Act. It is a coupler that will couple automatically by impact. That is, when they come together and they hit, there is a little pin on each coupler that when they hit, it drops down behind what we call the lock block and the coupling is made.

Q. And those couplers are constructed of steel? A. Well, they are molded. I think you would call it malleable steel.

Q. Approximately what does an automatic coupler weigh? A. Of course, I wouldn't be competent except to make a more or less guess, but from the looks of them, they would weigh from one hundred to two hundred pounds each. Of course, on a locomotive, they are even larger. I had a case down in New Orleans where we had one as an exhibit, and it was so heavy a man couldn't lift it. I suppose it would weigh about four hundred pounds on the locomotive.

* * * * * * * * * *

15 Q. Has your Bureau been concerned in the equipment on four wheel track cars and four-wheel hand cars or push cars since you have been there?

Mr. Meyer: Objected to for the reasons stated.

The Witness: They have not.

* * * * * * * * * * *

Mr. Meyer: I formally move to strike all of the testimony of the witness as being irrelevant to the issues in this case. I am reserving that right.

* * * * * * * * * * *

16 Q. Is it not a fact that despite the interpretation that the Commission has given to the Safety Appliance Act the courts have interpreted those acts differently at times?

* * * * * * * * * * *

The Witness: In answering that question, I would say that the Circuit Court of Appeals for the Second Circuit in the so-called Hoffman case did that very thing.

* * * * * * * * * * *

17 By Mr. Mackall:

Q. Has the Commision followed the court's ruling in the Hoffman case?

Mr. Meyer: I object to that.

The Witness: They have not.

* * * * * * * * * * *

**Defendant's Exhibit 6**

INTERSTATE COMMERCE COMMISSION
OFFICE OF THE SECRETARY
Washington 25

May 5, 1955

Steptoe & Johnson
Local Counsel
Shoreham Building
Washington, D. C.

Gentlemen:

We have your letter of May 2, 1955, concerning the proviso contained in 45 U.S.C. 6, reading as follows:

> That nothing in this chapter contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

In your letter you request a statement from this Commission concerning any action it has taken to apply this provision of law to four-wheel motor cars and four-wheel hand cars used on railroads.

The original Safety Appliance Act, approved March 2, 1893, required power brakes, automatic couplers and handholds or grab irons on railroad cars and locomotives. Its purpose was primarily to protect railroad employees from the hazards of coupling and uncoupling railroad cars, and dangers incident to going on tops of cars for the purpose of setting hand brakes.

On April 1, 1896, the amendment contained in the proviso heretofore quoted was approved to exclude four-wheel cars in the manner stated in the proviso.

The Act of April 14, 1910, authorized the Commission to designate the number, dimensions, location, and manner of application of the appliances named in what are now sections 4 and 11 of the present code. This provision of law is now contained in section 12 of the code.

By its order of March 13, 1911, the Commision carried out the requirements of what is now section 12 by issuing its order fixing the number, dimensions, location, and manner of application of safety appliances on railroad rolling stock.

A copy of that order is attached from which you will note that the Commission carried out this mandate as to Box and other house cars, Hopper cars, Gondola cars, Flat cars, Tank cars, Caboose cars, Passenger train cars, locomotives, and cars of special construction.

No specifications were issued for any other types of cars.

Respectfully,

HAROLD DARCLEY
*Secretary*

Defendant's Exhibit 16, 16a, 17

# WASHINGTON GROVE

[fol. 96] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,013

THE BALTIMORE AND OHIO RAILROAD COMPANY, APPELLANT

*v.*

DANIEL T. JACKSON, APPELLEE

Appeal from the United States District Court for the District of Columbia

*Mr. Laidler B. Mackall,* with whom *Mr. George B. Mickum, III,* was on the brief, for appellant.

*Mr. Milford J. Meyer,* of the bar of the Supreme Court of Pennsylvania, *pro hac vice,* by special leave of Court, with whom *Mr. Irving L. Chasen* was on the brief, for appellee. *Mr. Irving A. Levine* also entered an appearance for appellee.

OPINION—Decided June 7, 1956

Before PRETTYMAN, DANAHER and BURGER, *Circuit Judges.*

BURGER, *Circuit Judge:* A jury verdict was rendered in favor of appellee in an action under the Federal Employers' Liability Act [1] for damages for personal injuries sustained in the course of his employment with The Baltimore and Ohio Railroad Company.

Appellee was injured in the derailment of a four-wheel [fol. 97] motor track car which was then towing a four-wheel push truck along railroad tracks. The push truck weighed about 800 pounds empty and with the tools it was then carrying weighed about 1,200 pounds. There was no brake or motive power on the push truck. The motor track car was slightly heavier than the empty push truck and was equipped with a hand brake. While passing through a railroad station, the car struck a large dog; the impact derailed the car and appellee was thrown into a ditch and injured.

Appellee brought suit against the railroad under the Federal Employers' Liability Act, *supra,* alleging two

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[1] 35 STAT. 65 (1908), 45 U.S.C. §§ 51-60 (1952).

causes of action. The first cause of action was based on the negligence of appellant in directing appellee to operate a motor track car and push truck without sufficient braking power, and in requiring appellee to pull the push truck over wet, slippery rails when the truck was not equipped with brakes. The second cause of action alleged that appellee's injuries were proximately caused by appellant's violations of the Safety Appliance Act [2] and the Boiler Inspection Act [3]—specifically, in that (a) the motor car was not equipped with a power driving-wheel brake (air brake), (b) the push truck was not equipped with any brakes, and (c) appellant had directed appellee to operate a car and truck without sufficient braking power.

The court below ruled and charged the jury that the provisions of the Safety Appliance Act were applicable to the vehicles in question. The issues on both causes of action were submitted to the jury, which found in favor [fol. 98] of the appellee on "the issues aforesaid." This appeal is directed only to that part of the judgment which was based on the second cause of action.[4] Appellant contends: (1) the vehicles in question were not subject to the Safety Appliance Act and (2) appellee did not make a sufficient showing to go to the jury on the issue of whether the absence of the appliances allegedly required by the Safety Appliance Act was a proximate cause of the accident.

With respect to the first issue, appellant argues that the vehicles in question are exempt from the requirements of the Safety Appliance Act because of the proviso of § 6:[5]

> *Provided*, That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or

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[2] 27 STAT. 531 (1893), 32 STAT. 943 (1903), 36 STAT. 298 (1910), 45 U.S.C. §§ 1-16 (1952).

[3] 36 STAT. 913 (1911), 38 STAT. 1192 (1915), 43 STAT. 659 (1924), 45 U.S.C. § 23 (1952).

[4] Since the jury's determination does not reveal whether they found for plaintiff on both or simply one cause, error found on this appeal would call for a new trial, without any appeal as to the first cause of action.

[5] 27 STAT. 532 (1893), 29 STAT. 85 (1896), 62 STAT. 909 (1948), 45 U.S.C. § 6 (1952).

> to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

Both vehicles involved *were* four-wheel cars, one powered and braked, one with neither power nor brakes.

Appellee contends the exemption in § 6 refers only to *logging cars*, and in support of this argument cites the decisions in *Spokane & Inland Empire R.R.* v. *United States*, 241 U.S. 344 (1916); *Hoffman* v. *New York, N.H. & H.R. Co.*, 74 F.2d 227 (2d Cir. 1934), cert. denied, 294 U.S. 715 (1935); *Martin* v. *Johnston*, 79 So.2d 419, cert. denied, 350 U.S. 835 (1955). Appellant, however, correctly points to the fact that the statute as originally enacted simply said [fol. 99] "*Provided*, That nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains." 27 STAT. 532 (1893). The legislative history (discussed *infra*) shows that this provision was directed in its enactment specifically to exempt *coal cars*. 24 CONG. REC. 1477 (1893). Subsequently, in 1896, the proviso was amended to include "eight-wheel standard logging cars." 29 STAT. 85 (1896). The legislative history indicates that the proviso was amended because standard logging cars were only eight-wheeled. H.R. REP. No. 727, 54th Cong., 1st Sess. (1896).

The cases cited by appellee on this point are not helpful. In *Hoffman* v. *New York, N.H. & H.R. Co.*, *supra*, the court merely stated, without elaboration or explanation, that the exceptions in § 6 are limited to logging trains. In *Spokane & Inland Empire R.R.* v. *United States*, *supra*,[8] the Supreme Court referred to the § 6 exemption, again without discussion, as if it covered only logging trains.[8] In *Martin* v. *Johnston*, *supra*, the court made no reference whatsoever to the applicabiltiy of § 6.

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[8] This case was concerned only with the street railway train exemption of § 8, 32 STAT. 943 (1903), 45 U.S.C. § 8 (1952).

Although we do not believe the four-wheel car exemption in § 6 can be interpreted to apply solely to logging cars,[7] we do feel the legislative history demonstrates that Congress intended the four-wheel car exemption to be restricted to coal cars. The four-wheel car exemption was enacted in 1893 as part of the original Safety Appliance Act. The exemption was offered as an amendment to the original bill (H.R. 9350). The Senator offering the amendment stated:

> MR. BLODGETT. I desire to offer an amendment. At the end of section 6 of the bill as reprinted I move to add the following proviso:
>
> [fol. 100] *Provided,* That nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains.
>
> The PRESIDING OFFICER. The question is on agreeing to the amendment proposed by the Senator from New Jersey [MR. BLODGETT] to the amendment of the committee.
>
> MR. BLODGETT. Mr. President, I presume most Senators understand that coal from the mines is transported to the seaboard in four-wheel cars. The custom is to run such cars to the junction points of lateral roads and from those junction points to the mines where they are loaded. The four-wheel cars are used, because it would be practically impossible to run an eight-wheel car to the mines over the sharp grades and around the sharp curves necessary in reaching the mines. The coupling construction is a peculiar one, and is adapted to that peculiar work. A hook arrangement and link are used with considerable lost motion between the cars.
>
> It is necessary to use that appliance, as I said, in order to go around the sharp curves. *I believe it would be practically impossible to place the train brake and automatic coupler upon cars such as are used in that traffic, and if the bill is not amended as I propose, it will compel a reshipment of coal at all the junction*

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[7] United States v. St. Louis-San Francisco Ry., No. 5522, District Court for the Eastern Division of Mo., May 11, 1922 (unreported).

*points on the lateral roads to the main stem. I do not know that the cars containing but four wheels are used in any other service in the country except the coal service. Hence, I think the amendment is a very proper one.*

MR. CULLOM. I have had some conversation with the Senator from New Jersey in reference to his amendment, and he being much more familiar with the general subject of running the four-wheel cars than I, I am inclined to think perhaps his amendment is correct. I shall make no opposition to it myself. I have no objection to its adoption.

MR. STOCKBRIDGE. Let the amendment be read.

The Secretary read MR. BLODGETT's amendment to the amendment of the committee.

MR. STOCKBRIDGE. That is all right.

The amendment to the amendment was agreed to. [Italics supplied.] (24 CONG. REC. 1477 (1893).)

[fol. 181] We do not believe we can ignore such a clear and compelling statement as to the intent of the proviso.[8] To hold otherwise would require us to say that a railroad could run entire trains of four-wheel maintenance and supply cars drawn by a powered tractor, also having four wheels, and disregard the admitted fact (J.A. 69-70) that unbraked vehicles behind the powered tractor extend the distance required to stop the train, thus exposing employees to substantially increased hazards.

Our conclusion is further reinforced by the fact that if the four-wheel car exemption is interpreted to cover all

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[8] As the Supreme Court said in United States v. American Trucking Ass'ns., 310 U.S. 534, 543 (1940), "Frequently, however, even when the plain meaning [of a statute] did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"

four-wheel cars, this means a four-wheel motor track car like the one appellee was driving need not even be equipped with hand brakes as required by § 11 [9] of the act, even though that car might be driven along a slippery railroad track at 20 m.p.h. We do not believe Congress intended [fol. 102] such a result when it provided in § 11 that "all cars must be equipped with . . . efficient hand brakes." 36 STAT. 298 (1910), 45 U.S.C. § 11 (1952). The long-established command to interpret this act liberally to accomplish its declared objective, the safety of persons and trains,[10] no doubt guided the trial court, and we think correctly so.

We are aware that when the logging-car exemption was added in 1896 the House Report [11] stated, in referring to the original four-wheel exemption:

> In the original act of March 2, 1893, there is a provision at the end of section 6 which exempts trains composed of four-wheeled cars from the operations of the act. This was evidently intended to applying to logging trains, but it happens that the cars are of eight wheels and do not come within the exception.

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[9] Although the § 6 exemption is not referred to in § 11 of the act, § 16 provides:

> § 16. Application of provisions to common carriers and vehicles subject to "Safety Appliance Acts." The provisions of sections 11-16 of this title, as to the equipment of cars with the designated safety appliances apply to every common carrier and every vehicle subject to what are commonly known as the "Safety Appliance Acts" set out in sections 1-10 of this title. (36 STAT. 298 (1910), 45 U.S.C. § 16 (1952).)

Since a four-wheel car is exempt from §§ 1-10 of the act, it would seem to be exempt from § 11.

[10] Lilly v. Grand Trunk Western R.R., 317 U.S. 481, 486 (1943); Brady v. Terminal R.R. Ass'n, 303 U.S. 10, 15 (1938); New York Central R.R. v. United States, 265 U.S. 41, 44-45 (1924).

[11] H.R.REP. No. 727, 54th Cong., 1st Sess. (1896).

Obviously, the draftsman of this 1896 report failed to read the 1893 legislative history for there is no support for the House Report's conclusion and we must view the statement in the 1896 House Report as one Congress' erroneous *post* legislative view of the intent of a prior Congress.

Appellant also argues that the motor track car in question is not covered by the act's §1 [12] requirement for air [fol. 103] brakes and a train brakes system (brakes on all cars which can be controlled from locomotive) because the car is not used to haul *standard railroad cars* and is, therefore, not a locomotive.

We find nothing in the authorities cited by appellant which leads to a conclusion that a vehicle is a "locomotive" only if it is actually used to haul standard railroad cars. In *United States* v. *Fort Worth & Denver City Ry. Co.*, 21 F.Supp 916 (N.D. Tex. 1937), the court held that a locomotive crane which was used to haul three other cars was a locomotive within the meaning of §1 of the Safety Appliance Act. The court stated at p. 918:

> . . . In other words, while the equipment is being used as a crane, and moved about at the scene of construction, it is still a crane and does not become a locomotive, but where, as here, it is used to haul cars for a distance up to two and one-half miles from a switch to the scene of construction, it is being used for the purposes for which a locomotive is used and is a locomotive within the meaning of the statute. While the equipment is being used as a locomotive, it is a locomotive, regardless of whatever else it might also be.

The court in *Hoffman* v. *New York, N.H. & H.R.Co.*, *supra*, held that a gasoline tractor which was hauling a hand

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[12] This section provides in pertinent part:

> It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system. . . . (27 STAT. 531 (1893), 45 U.S.C. §1 (1952).)

car, was a locomotive within the meaning of 45 U.S.C. §§ 1, 2.[13]

The I.C.C. order of December 14, 1925,[14] providing

> [fol. 104] A locomotive is a self-propelled unit of equipment designed solely for moving other equipment.
>
> A motor car is a self-propelled unit of equipment designed to carry freight or passenger traffic, and is not to be considered a locomotive.

is a classification which cannot control the courts in this situation. That definition is for purposes other than those we must deal with here. Since the motor track car in the instant case was being used to move other equipment, the I.C.C. order does not preclude a conclusion, on the facts of this case, that the car was then a locomotive even though it was not designed *solely* for moving other equipment.

In the present case the motor track car was being used to haul another car, i.e., it was functioning as a locomotive and was, therefore, a locomotive within the meaning of the Act. Its actual use controls over its name.

Appellant's second contention is that appellee failed to carry the burden of proving that the absence of the type of brakes allegedly required by the Safety Appliance Act was a proximate cause of the accident.

Appellee testified that if he had been driving the motor car alone without the truck, he could have stopped in about six to eight feet. Mr. Chrissinger, the Railroad's brake expert, testified that if the existing brakes lock[15] the wheels, the efficiency of the brakes would not be increased by increasing the brake power. Since this testimony was un-

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[13] We do not believe the court based its decision solely on the fact that the "gasoline engine was frequently used to haul a long line of cars" (74 F.2d at 232).

[14] In the Matter of Rules and Instructions for the Inspection and Testing of Locomotives Propelled by Other Than Steam Power in Accordance With the Act of February 17, 1911, Amended March 4, 1915, June 26, 1918, and June 7, 1924.

[15] Appellee had testified that the brakes did lock the wheels of the motor car.

contradicted, it is suggested that air brakes would not have helped in any way to prevent the accident. However, this expert, on cross-examination, conceded that any unbraked portion of equipment behind the motored unit adds to the stopping distance of the entire train. Thus, the jury might reasonably find from the testimony that although air brakes on the motor car would not have been more efficient than the present brakes, the train, consisting of the motor car and push truck, would have stopped sooner if the push truck had been equipped with brakes controlled from the motor car (a train brake system)—i.e., that appellee either could have stopped before hitting the dog or could have slowed down sufficiently so that the impact would not have derailed the car.[16]

Affirmed.

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[fols. 106-108] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT—April Term, 1956

No. 13,013

THE BALTIMORE AND OHIO RAILROAD COMPANY, APPELLANT,

v.

DANIEL T. JACKSON, APPELLEE

Appeal from the United States District Court for the District of Columbia. Before: Prettyman, Danaher and Burger, Circuit Judges.

JUDGMENT—June 7, 1956

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

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[16] It is sufficient under the Federal Employers' Liability Act that the injury result *in part* from defendant's negligence. 35 STAT. 65 (1908), 45 U.S.C. § 51 (1952); Schulz v. Pennsylvania R.R., 350 U.S. 523, 526 (1956); Coray v. Southern Pacific Co., 335 U.S. 520, 524 (1949).

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

It is further ORDERED by the Court that appellee herein recover from appellant his taxable costs on this appeal and have execution therefor.

Dated: June 7, 1956.

Per Circuit Judge Burger.

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[fol. 109] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 110] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1956

No. 370

THE BALTIMORE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

DANIEL T. JACKSON

ORDER ALLOWING CERTIORARI—Filed November 5, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duty certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.